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## ARTICLE

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### RETRIBUTIVE EXPUNGEMENT

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*Expungement relief was introduced in the mid-twentieth century to reward and incentivize rehabilitation for arrestees and ex-offenders and to protect their privacy. Recently, many states have broadened their expungement remedies, and those remedies remain useful given the negative effects of public criminal records on reentry. But recent scholarship has suggested an “uptake gap,” meaning many who are eligible never obtain relief. Despite broadening eligibility, petitioners face substantial obstacles to filing, pre-hearing hurdles, waiting periods, and difficult standards of review without the assistance of counsel. And even when expungement is granted, the recipients are basically left on their own to guarantee the efficacy of the remedy. Some of these attributes of expungement were originally conceived as features, designed to ensure only the most rehabilitated received relief, allowing the state to continue to pursue public safety objectives with public criminal records. But the cold reality of expungement procedure leaves many petitioners facing insurmountable obstacles that amplify the effects of the punishment originally imposed.*

*In exploring this reality, this Article illustrates that expungement procedure is stuck in a rehabilitative and privacy-centric paradigm. While this framework inspired the creation of expungement remedies and recent reforms, it also has justified onerous procedural obstacles and the placing of the burden of persuasion on the petitioner rather than the state. Outside of automated expungement, which is still relatively rare and restricted to only certain types of petitions, most expungement*

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*regimes in substance or through procedure invert what should be the state's burden to justify retention of criminal records that enable extra punishment by state and private actors. An alternative theoretical basis for expungement is necessary to convince policymakers and decision-makers of the need for broader substantive and procedural reform.*

*This Article suggests a different paradigm: retributive based expungement. It proposes that incorporating retributive constraints that already underlie the criminal system can benefit petitioners. Plenty of arrestees do not deserve stigma and ex-offenders have done their time, meaning punitive stigma from public criminal records can amount to unwarranted punishment. A retributive-minded expungement procedure would all but guarantee expungement in the case of arrests, where the desert basis is questionable, and would place the burden of proof on the state for convictions once desert has been satisfied. As such, this approach can supplement the case for broader eligibility, automated expungement, and favorable pre-hearing procedures that limit the uptake gap. It also has legal and political viability given that many states already maintain retributivist constraints on sentencing and given that huge swaths of the public perceive desert as a crucial component of any criminal justice issue. In fact, some states are already moving in this direction and can serve as a model for the rest of the country. In short, retributivist constraints can trim procedural overgrowth to supplement substantive reforms that already recognize the disproportionate effects of a public criminal record.*

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## INTRODUCTION

The “expungement process” is a disjunctive legal concept. Whereas the term “expungement”<sup>1</sup> promises the hopeful wiping away and creation of a blank slate, “process” conveys time, ordeal, and mechanics. For some time, these processes have been justified as necessary adjuncts to the expungement remedy—features designed to ensure that only the truly worthy petitioners have their records wiped clean.<sup>2</sup> This Article takes a different view, suggesting expungement procedures are a problem, and that their existence stems from a problematic theoretical conception of expungement itself. In particular, the combination of rehabilitative logic and concerns for public safety has let the process, in short, prevent more expungement.<sup>3</sup> And it is those processes that must be scrutinized if substantive expungement law—which has undergone dramatic reforms in numerous states nationwide<sup>4</sup>—is to attain for petitioners what it promises to provide.

Nearly every jurisdiction in the United States promises some form of expungement relief to some subset of individuals who have encountered the criminal justice system.<sup>5</sup> Available remedies come in different shapes and

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<sup>1</sup> “Expungement” has different meanings in different jurisdictions. For purposes of this Article, it is meant to include, unless specified otherwise, the range of outcomes associated with the term, including erasure, sealing, set-asides, and other terminology. BLACK’S LAW DICTIONARY defines *expungement of record* as “the removal of a conviction (esp. for a first offense) from a person’s criminal record.” *Expungement of Record*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>2</sup> See *infra* Section II.B.

<sup>3</sup> This is, of course, a reference to the much more famous arguments made in the classic work by Malcolm Feeley. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–200, 241 (1992).

<sup>4</sup> See *infra* Section III.A.

<sup>5</sup> See *50-State Comparison: Expungement, Sealing & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. RESTORATION OF RTS. PROJECT (Oct. 2020), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside> [https://perma.cc/FW5F-KMFC].

sizes, with broader eligibility in some states, and relatively narrow relief available in others.<sup>6</sup> Initially applicable to just arrests, over two-thirds of states have now extended relief to convictions.<sup>7</sup> The number of attempted reforms has been significant over the past decade, ushering in a new era of expungement, at least in theory.<sup>8</sup> The arrival of a few “clean slate” laws and automated expungement procedures promise more than many ever thought would be possible.<sup>9</sup> But the majority of substantive reforms have not been matched with attention to the procedures accompanying the provision of relief, rendering the promise hollow for many.

Procedure is one aspect of a multi-factored “uptake gap” that undermines the broader utility of expungement.<sup>10</sup> Few who have contacted the criminal justice system know expungement even exists, learning about their eligibility only through the efforts of legal aid and other attorneys.<sup>11</sup> The average petitioner must jump through several hoops, which come in various forms, in order to obtain an expungement. First, there are the initial mounds of paperwork that require the petitioner’s attention, and in many instances, the assistance of costly<sup>12</sup> or overworked counsel<sup>13</sup>—counsel that is not guaranteed despite the punitive effects of a criminal record.<sup>14</sup> Petitions require careful

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361, 362, 369 (2016) (describing that, between 2009 and 2014, because of increased interest in criminal law reform, over sixty percent of states attempted to broaden their expungement laws).

<sup>9</sup> For example, Pennsylvania enacted the Clean Slate Act, which automates expungement for certain types of charges and conviction information. New Jersey and a few other states have similar new laws. See *infra* Section III.A.

<sup>10</sup> J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2486-87, 2501-06 (2020) (describing the issue of uptake gaps and listing and analyzing six factors explaining these gaps: lack of information, administrative hassle and time constraints, fees and costs, distrust and fear in the criminal justice system, lack of access to counsel, and insufficient motivation to pursue expungement).

<sup>11</sup> See LENORE ANDERSON, JOHN CUTLER, JAY JORDAN, ROBERT ROOKS & JASON ZIEDENBERG, ALL. FOR SAFETY & JUST., CREATING MODEL LEGISLATIVE RELIEF FOR PEOPLE WITH PAST CONVICTIONS 7 (2019), <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/09/Model-Policies-Brief.pdf> [<https://perma.cc/QS2T-46YL>] (describing how awareness of expungement relief remained remarkably low despite a public relations campaign in the wake of new legislation in California).

<sup>12</sup> The author is mindful of his time as an expungement attorney in Southeastern Pennsylvania, where private attorneys routinely charged thousands of dollars to help prepare expungement petitions for wealthy petitioners, effectively funneling all other petitions to overwhelmed legal aid organizations.

<sup>13</sup> Legal aid entities often conduct the most expungement work, but are resource-strapped.

<sup>14</sup> The Sixth Amendment to the Constitution does not afford a right to counsel in expungement proceedings, and many other post-disposition contexts, as they are not “critical stages” relating to guilt or innocence. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 218 (2008).

attention to detail, the retrieval of numerous government documents, and interpretation of and compliance with state, local, and judicial rules.<sup>15</sup>

Second, there are the tangible and time-based obstacles. Petitioners might have to travel to multiple offices to obtain identity-validating information, such as fingerprints, to enable multiple state agencies to communicate seamlessly. These trips are not free, and the immediate opportunity cost can be high: a missed day of work and pay, or the need to hire a costly babysitter. These realities can discourage the indigent from applying in the first place. For those who can afford the fees, the tradeoff might still not seem apparent. Despite that there are expungement clinics and legal advocates willing to assist, the general knowledge of potential petitioners about their rights and such resources remains low.<sup>16</sup> Third, assuming a petitioner can file the requisite petitions, hurdles remain in the form of objecting prosecutors,<sup>17</sup> agencies refusing to coordinate,<sup>18</sup> and difficult standards of review placing the burden of persuasion on the petitioner.<sup>19</sup>

These obstacles, for some, are features of expungement law. They purportedly identify those who are serious about reentry, effectively rehabilitated, and motivated to better themselves. In short, they operate to delineate who is worthy of expungement by clarifying who has the appropriate character after encountering the criminal justice system. But in an era when the stigmatizing effect of public criminal record history information—often sold by jurisdictions to private parties—is undeniable, irrespective of the person's individual character (reformed or not), these ostensible features are better understood as bugs. They are actually eating away at the core promise underlying expungement regimes, a promise that

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<sup>15</sup> For example, in Philadelphia, expungement petitions have a particular set of formal requirements that comport with local rules of the court. See FIRST JUD. DIST. OF PA., PETITION FOR EXPUNGEMENT PURSUANT TO PA. R. CRIM. P. 790, <https://www.courts.phila.gov/pdf/forms/criminal/Expungement-790.pdf> [<https://perma.cc/CHE3-EBUU>]. Petitions that deviate from those rules, even submitted by pro se petitioners, can be denied on technical grounds. PA. R. CRIM. P. 790. If they are granted, their malformation often prevents their efficacy.

<sup>16</sup> Prescott & Starr, *supra* note 10, at 2502; ANDERSON ET AL., *supra* note 11, at 7.

<sup>17</sup> See Brian M. Murray, *Unstitching Scarlet Letters? Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2846, 2848 (2018) (describing the various ways that a prosecutor can impede the expungement process).

<sup>18</sup> See Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 332 (2019) (describing mismatching of records between agencies). The author recalls his time as a legal aid attorney, spending hours on the phone with the State Police to match records with those that existed in the court system. State statutes often task petitioners with coordinating the efforts of multiple agencies. See *infra* Section III.B.

<sup>19</sup> Different jurisdictions approach expungement adjudication differently. Some have high burdens, others low, and still others mixed. See *infra* Section III.B.2.

has been verified by recent studies that show the positive impact of expungement on recidivism and employment.<sup>20</sup>

Why is expungement procedure so complicated and difficult? This Article advances the following theory: these obstacles are the fruits of the original expungement paradigm that was built on two pillars: (1) rehabilitative logic and (2) privacy concerns. These were balanced with the public safety interests of the state, giving rise to moderate expungement regimes in the mid-twentieth century. This paradigm has driven action in the expungement area since. Expungement laws rose to prominence in an era when rehabilitation dominated public policy discussions about punishment.<sup>21</sup> These discussions had great virtue and, in fact, shifted sentencing regimes away from a singular focus on extremely punitive responses to crime. But, like many public policies, reliance on rehabilitation also had unintended consequences. One such consequence of the focus on rehabilitation was a system of expungement procedures designed to locate the most rehabbed individuals, or least “risky bet,” by placing the onus squarely on the ex-offender or ex-arrestee. The result was a set of expungement regimes that forced the petitioner to prove her mettle by navigating a world of byzantine procedures and onerous substantive requirements, with decision-makers attempting to balance the petitioner’s privacy interests against the public safety goals of the state.<sup>22</sup>

That makes sense when rehabilitation is the underlying goal of corrections and when public safety rationales dominate the administration of the criminal system. Indeterminate sentencing regimes, governed by parole boards and probation officers, operated the same way, looking to proof of rehabilitation as the exit pass from the criminal justice system.<sup>23</sup> A rehabilitative focus allows the state to simultaneously work towards reforming individuals and manage public safety by requiring more and more corrective behavior on the part of those sentenced. And during the completion of a direct sentence, there is cause for that approach.

The problem, however, is that in the context of expungement, rehabilitative premises invert what should be the calculus regarding

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<sup>20</sup> See generally Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1 (2018) (discussing the positive impacts of legal record clearing remedies, including subsequent increases in employment rates and real average earnings).

<sup>21</sup> Sarah Glazer, *Sentencing Reform*, 24 CQ RESEARCHER 27, 30-31 (2014); Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1326, 1370 (2017).

<sup>22</sup> See *infra* Section II.B.

<sup>23</sup> See TONY WARD & SHADD MARUNA, *REHABILITATION: BEYOND THE RISK PARADIGM* 8-23 (2007) (reframing the debate from “[w]hat works” to “[w]hat keeps people straight” to emphasize the priority of rehabilitation); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 296 (2016) (describing probation officers as deterrents rather than rehabilitators).

expungement of a conviction—where the sentence has already been served—or an arrest—where blameworthiness was never found as a matter of law. Expungement presupposes that harm to the petitioner has already been inflicted, either by virtue of an arrest or a conviction with a sentence. The petitioner has suffered at the hands of the state already, either via the stigma attached to the arrest or due to a sentence inflicted after a duly obtained conviction. Having done the time, requiring the petitioner to prove why the state should not keep inflicting harm through the maintenance of a public criminal record in order to obtain expungement is puzzling. Doing so forces petitioners to prove why they no longer deserve punishment, but it is the state that must justify inflicting harm stemming from contact with the system. That is the case for the arrestee without a conviction and the convicted individual who has done his time.

As such, this Article suggests that the original theoretical bases behind expungement regimes actually can stunt their efficacy, meaning the inspiration for expungement has limited its aspirations. Rehabilitative logic supports expungement in theory, but in terms of details of administration, it only can go so far. And we are seeing that unfold again in real-time, as legislators argue over the public-safety implications of expungement regimes and ask whether a particular measure will advance or limit public safety. Public-safety rationales can only go so far to persuade, especially when the fundamental lens through which the average constituent evaluates the criminal justice system remains desert.<sup>24</sup> And when policymakers and decision-makers are still dialoguing about evolving privacy norms, the combination of rehabilitative logic and concerns for privacy does not provide solid ground for expanding expungement relief and making the process less onerous. While a few states have trended towards automatic expungement for a limited class of criminal records, widespread procedural reform across jurisdictions requires a more robust theoretical footing.

In response to this critique, this Article proposes a new expungement paradigm, focusing on the obligations and constraints of retributive justice. Referring to this lens as “retributive expungement,” the Article argues desert-based expungement will place petitioners in a better position by requiring the state to justify why continued punishment (by denying expungement, either substantively or via procedural means) is appropriate. This perspective supports a positive duty on the state to make eligible individuals aware of the possibility of relief and can support presumptions for expungement and

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<sup>24</sup> See Paul H. Robinson & Robert Kurzban, *Concordance and Conflicts in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007) (noting how lay intuitions about crime and punishment are mostly fixed in certain contexts).

automatic expungement after set timelines. The key to reforming expungement is to supplement its rehabilitative value with a dose of desert.

As such, this Article makes several contributions. First, it comprehensively describes the theoretical origin of expungement, demonstrating its rehabilitative and privacy-centric roots. It canvasses the world of expungement procedure both then and now, identifying the degree to which processes reflect these premises and inhibit expungement. This interpretive story responds to Professors Sonja B. Starr and J.J. Prescott's study that found a significant uptake gap in the rate at which expungement was achieved. One contributing factor identified was the sets of procedures underlying the remedy itself, and it is the aim of this Article is to zoom in on those procedures and why they exist. In truth, they relate to the genesis of expungement regimes: a serious, and well-intentioned concern for rehabilitation and reentry to decrease recidivism. Procedure has remained static for this reason. As such, Part II descriptively identifies rehabilitative and privacy-based expungement regimes dating back the 1950s and 60s, and Part III demonstrates that the same paradigm still lives despite significant substantive reforms.

In addition to these descriptive and interpretive contributions, this Article advances a normative claim: that injecting expungement regimes with a dose of retributive principles can lead to a more favorable remedy, both in substance and procedure. Retributive principles would shift the spotlight to the state, focusing on the state's responsibilities as punisher to not over-punish. It argues that retributive principles can support a presumption for expungement, rebuttable only on a context-specific basis.

While many who support criminal justice reforms that help arrestees and those who have been convicted are skeptical of retributivist models and favor a rehabilitative approach, the retributivist approach has practical appeal given that many states already maintain retributivist constraints on the coercive power of the state in their sentencing regimes.<sup>25</sup> It is politically viable because desert dominates perceptions of the wisdom of criminal justice decisions among prosecutors, judges, and the public. And it is mindful of the restorative components underlying desert, proportionality, the associational, communal, and state duties towards the punished, and the adverse effects of collateral consequences and shaming on reentry. In fact, some states are already moving in this direction, and their efforts can serve as a model for the rest of the country. This lens supports reforms like automated expungement, which would be more palatable if presented to the wider populace as an extension of desert-based principles not only justifying but limiting the state's ability to punish.

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<sup>25</sup> See *infra* subsection IV.B.1.



In short, for reformers to usher in a new era of expungement, connecting with retributivism is worthwhile. This approach can trim procedural overgrowth to supplement substantive expungement reforms that already recognize the disproportionate effects of a criminal record. Retributive expungement can help narrow the uptake gap that is currently preventing many who have contacted the criminal justice system from getting the relief they deserve.

## I. THE PUNITIVE EFFECT OF PUBLIC CRIMINAL RECORDS

Public criminal records are everywhere. The days of trekking to the courthouse and requesting paper files are almost entirely a thing of the past. Nearly a third of the adult population of the United States has information about interactions with the criminal justice system available to the broader public.<sup>26</sup> This information exists online in multiple places, and state governments sell the data to private companies<sup>27</sup> to make money to subsidize governmental budgets.

At times, the numbers can seem jaw-dropping. The FBI adds over ten thousand names to its records each day alone.<sup>28</sup> The number of documented arrests is approaching three hundred million.<sup>29</sup> This information exists beyond FBI databases—multiple governmental agencies and hundreds of private companies maintain these records.<sup>30</sup> States maintain this information

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26 MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMSELLEM, THE NAT'L EMP. L. PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), [https://www.nelp.org/wp-content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/44QZ-GSH6>] (noting that over twenty-five percent of the adult population has a criminal record); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, WALL ST. J. (Aug. 7, 2015, 11:59 AM), <http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802> [<https://perma.cc/B8UM-AG9X>] (reporting that nearly one-third of American adults has a police record); see also Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/QH8R-W9NS>] ("America has a rap sheet.").

27 See James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 401 (2006) ("Some private information brokers obtain court records en masse. Credit bureaus have always obtained information on individual criminal history from court records."); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 180-81 (2008) (offering a brief history of federal involvement in state record keeping efforts). Jacobs and Crepet also catalog how commercial vendors purchase this information, in bulk, from state record repositories. *Id.* at 185-87.

28 Fields & Emshwiller, *supra* note 26.

29 *Id.*

30 Jacobs & Crepet, *supra* note 27, at 186 ("An internet search for 'criminal records' yields dozens of companies offering, for a modest fee, to carry out criminal background checks for employment, housing, and other purposes. These companies are somewhat regulated by the federal Fair Credit Reporting Act (FCRA).").

in electronic formats.<sup>31</sup> Many know these items as “rap sheets.” They catalogue experiences of individuals in the system, ranging from the moment of booking and arrest to the results of post-conviction proceedings. The ability to interpret this complicated data requires experience and, given that the information can be incorrect, the presentation of an incomplete picture can contribute to the overall stigma stemming from a public criminal record.<sup>32</sup>

This information has significant consequences for those attempting to reenter society after contacting the criminal justice system.<sup>33</sup> First, and perhaps most importantly, the information can drive decisionmaking by non-state actors when determining whether to give someone an opportunity. Employers are entitled to use the information in numerous ways.<sup>34</sup> Landlords can as well.<sup>35</sup> State occupational licensing agencies can utilize the information to restrict the ability to pursue a livelihood.<sup>36</sup> Other public benefits or resources might be diminished or made unavailable on the basis of the information.

Collateral consequences associated with a criminal record are severe and pervasive.<sup>37</sup> There are close to forty-five thousand on the books.<sup>38</sup> They span all three levels of government.<sup>39</sup> Some are mandatory, preventing the use of

<sup>31</sup> See Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809, 839 (2015) (“Every state has a criminal justice repository that maintains databases of fingerprints and criminal records, including the fingerprints of certain public employees or licensees.”).

<sup>32</sup> See, e.g., Fields & Emshwiller, *supra* note 26 (giving examples of the lingering impact of arrest records, even when charges were ultimately dropped); Jacobs, *supra* note 27, at 400 (“[O]f course, these instruments confirm that a particular individual has faced or is facing particular criminal charges, which may be all the information that the requester wants to know and all that is necessary to negatively impact the individual’s current and future opportunities.”).

<sup>33</sup> While this section surveys the types of criminal records that exist and the consequences that can flow from them, it is not meant to be comprehensive. Some of my previous work, as well as the work of countless others, discusses this phenomenon in greater detail.

<sup>34</sup> See e.g., 18 PA. CONST. STAT. § 9125(b) (2020) (permitting usage of felony or misdemeanor conviction information when making employment decisions).

<sup>35</sup> See e.g., OFF. OF GEN. COUNS., U.S. DEP’T OF HOUS. & URB. DEV., GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF)

[<https://perma.cc/88R7-P3WM>] (describing how, absent a disparate impact or effect on the basis of a protected trait, unlawful discrimination on the basis of a criminal record is difficult to prove).

<sup>36</sup> See generally RODRIGUEZ & AVERY, *supra* note 26.

<sup>37</sup> See generally MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE (2013).

<sup>38</sup> *Collateral Consequences Inventory*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> (click “Search” with no filtering information) [<https://perma.cc/WH6S-9MRQ>] (last visited Dec. 10, 2020).

<sup>39</sup> See, e.g., 42 U.S.C. § 13663 (prohibiting public housing for households with individuals subject to lifetime sex offender registration); WIS. STAT. § 6.03(1)(b) (2020) (establishing disenfranchisement for persons convicted of treason, felony, or bribery); *Standley v. Town of Woodfin*, 661 S.E.2d 728, 729 (N.C. 2008) (discussing a town ordinance that affected movement of registered sex offenders within the municipality).

discretion in concrete cases. Others are discretionary, allowing employers and licensing agencies to evaluate eligibility case-by-case, but often without clear guidance on what type of record should be prohibitive or not.

Further, arrest and conviction records both lead to these consequences. For example, a non-conviction disposition can still affect one's deportation status.<sup>40</sup> Nearly sixty-five million adult Americans have an arrest record, with minority groups representing a disproportionate share of the population.<sup>41</sup> This is the result of mass criminalization, a system dominated by misdemeanor arrests,<sup>42</sup> and few post-arrest obstacles to formal charges.<sup>43</sup> These arrests also are not the sort on the front pages of the local newspaper or the evening news; as such, the records exist in the shadow of other criminal justice processes, out of the eye of the average individual assessing the validity of the system as a whole.<sup>44</sup> As Eisha Jain has written, arrests are often used as proxies during screening for jobs or other public benefits and to regulate

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<sup>40</sup> See, e.g., 8 U.S.C. § 1101(a)(48)(A) (defining "conviction" broadly).

<sup>41</sup> Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 964 (2013). By age twenty-three, "one out of every three adults can expect to be arrested . . ." Jain, *supra* note 31, at 817. For Black and Latino men, that statistic is closer to one in two. *Id.*

<sup>42</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804 n.78 (2012).

<sup>43</sup> See Gary L. Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same*, 35 MO. L. REV. 281, 281-83 (1970) (proposing alternatives to the preliminary hearing to protect against baseless charges); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 468-69, 498 (1980) ("The pretrial process requires only a minimal showing of factual guilt."). See generally William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 511 (2016) ([ "[T]he probable cause standard exacerbates plea bargaining's innocence problem and its propensity for prosecutorial control of criminal justice." ).

<sup>44</sup> As I have mentioned elsewhere, a common argument against expungement is that the Internet age and pervasiveness of news outlets undercuts the utility of the remedy. See Murray, *supra* note 17, at 2833 n.61. But so many charges never make it to those public places, yet remain in databases searched and combed by employers and other actors, containing data coming from public entities that are within the reach of expungement laws.

behavior.<sup>45</sup> For example, public housing authorities,<sup>46</sup> Immigration Customs and Enforcement (ICE),<sup>47</sup> and employers all use arrest information.<sup>48</sup>

Conviction-based criminal records have even more effect than arrest records on individual opportunities, and also disproportionately impact marginalized communities.<sup>49</sup> Federal and state statutes expressly bar ex-offenders from filling certain jobs.<sup>50</sup> Convictions can result in ineligibility for public benefits, such as welfare, medical benefits, and unemployment.<sup>51</sup> Because many of these benefits, and the ability to obtain a job,<sup>52</sup> relate to positive reentry, the effect can be stark.

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<sup>45</sup> Jain, *supra* note 31, at 810 (“[A]ctors outside the criminal justice system, such as immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials, among others . . . use arrest information for their own purposes and in ways that are distinct from the aims of the criminal justice system.”).

<sup>46</sup> Jain, *supra* note 31, at 833-38.

<sup>47</sup> *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFT, [http://web.archive.org/web/20140910121059/http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://web.archive.org/web/20140910121059/http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Sept. 10, 2014) (“Through April 30, 2014, more than 283,000 convicted criminal aliens were removed from the United States after identification through Secure Communities.”); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-708, *SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED* 14 (2012), <https://www.gao.gov/assets/600/592415.pdf> [<https://perma.cc/FMH2-H795>] (twenty percent of Immigration and Customs Enforcement removals in 2010 and the early part of 2011 were linked to Secure Communities). It is common for ICE to detain an individual upon learning of an arrest within the state system. *See Immigration Detainers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers> [<https://perma.cc/QT33-MF75>] (“An ICE detainer is a written request that a local jail or other law enforcement agency detain an individual for an additional 48 hours after his or her release date in order to provide ICE agents extra time to decide whether to take the individual into federal custody for removal purposes.”).

<sup>48</sup> *See* SOC’Y FOR HUM. RES. MGMT., *BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS* (2010), <http://www.slideshare.net/shrm/background-check-criminal> [<https://perma.cc/X6BM-BHFY>] (showing a majority of employers run criminal background checks on interviews); Memorandum from Brian P. Ritchie, Acting Deputy Inspector Gen. for Evaluation and Inspections, Off. of Inspector Gen., to Marilyn Tavenner, Adm’r, Ctrs. for Medicaid & Medicare Servs. 1 (May 29, 2014), <http://oig.hhs.gov/oei/reports/oei-07-14-00131.pdf> [<https://perma.cc/Z6MK-RBSD>] (showing that forty-one states require background checks on home health agency employees).

<sup>49</sup> U.S. COMM’N ON C.R., *COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES* 19 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/T2FW-CH59>].

<sup>50</sup> *See* EMP. UNIT, CMTY. LEGAL SERVS. OF PHILA., *LEGAL REMEDIES AND LIMITATIONS: EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS IN PENNSYLVANIA* 6-11 (2019), <https://clsphila.org/wp-content/uploads/2020/06/Legal-Remedies-and-Limitations-February-2019.pdf> [<https://perma.cc/KM75-AZ5V>] (noting how individuals with certain types of convictions cannot seek employment at airports, banks, insurance companies, long-term care facilities, ride sharing companies, and schools, even in certain security positions).

<sup>51</sup> 21 U.S.C. § 862a(1)(A); 42 U.S.C. § 1320a-7(a)(4), (b)(3); 43 PA. STAT. AND CONS. STAT. ANN. § 802(g) (West 2018).

<sup>52</sup> *See* Peter Leasure & Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 N.Y.U. REV. L. & SOC. CHANGE 271, 273-74 (2018) (describing impacts on employment outcomes); Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of*

Criminal records not only generate collateral consequences, they also have a less tangible but nonetheless weighty stigmatizing effect on ex-arrestees or offenders, and a communicative effect on those made aware of the history. Criminal records communicate negative interactions with the criminal law. These records are quite readily available to the average consumer; accessing paper records or a physical file is no longer necessary.<sup>53</sup> Almost every state has a publicly available Internet database of criminal records that are accessible with the click of a few buttons and the entry of a name, address, and other information. Results can list court summaries as well as provide access to court dockets.

A cottage industry of sorts also exists; in the information age, it is not difficult set up websites or other data-sharing initiatives that proliferate and enable the sharing of criminal record information.<sup>54</sup> In the past two decades, this has turned into a profitable business<sup>55</sup> with a sizeable market, considering over ninety percent of employers report performing background checks on some employees.<sup>56</sup> That business reality, coupled with societal fascination with the dirty laundry of others, has led to less elaborate, but extremely pugnacious operations, like “Mugshot” websites.<sup>57</sup> The industry prioritizes quick checks<sup>58</sup> at the risk of inaccurate reporting. Given that many of these sites rely on state databases, and in fact purchase the information from such databases at a bulk rate,<sup>59</sup> errors at the source are particularly problematic.

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*Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL’Y REV. INTER ALIA 11, 11 (2016).

<sup>53</sup> Jacobs, *supra* note 27, at 387.

<sup>54</sup> *Id.* at 388 (noting numerous private vendors).

<sup>55</sup> U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 2 (2006), [https://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf) [<https://perma.cc/8LCF-YZBA>] (noting that most private employers conduct background searches through private enterprises or through commercial databases that aggregate criminal records).

<sup>56</sup> SOC’Y FOR HUM. RES. MGMT., *supra* note 48.

<sup>57</sup> See David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html> [<https://perma.cc/Z9YD-YK3Z>] (describing the disruptive effect just a picture on a mugshot website can have on someone’s life).

<sup>58</sup> See, e.g., *Traffic, Criminal and Arrest Records Search*, INSTANT CHECKMATE, <https://www.instantcheckmate.com/criminal-records> [<https://perma.cc/5RH8-9STN>].

<sup>59</sup> Jacobs, *supra* note 27, at 395.

[T]here are laws in every state mandating or authorizing the release of individual criminal history records to certain non-criminal justice government agencies—agencies charged with granting licenses to individuals and firms in diverse businesses, ranging from liquor stores and bars to banks and private security firms as well as to agencies that provide programs and services to vulnerable populations including children, the elderly, and the handicapped.

*Id.*

In short, the combination of public criminal record history information and collateral consequences has significant effects on the justice of punishment that results by virtue of contact with the criminal justice system. Public criminal records connect to penal purposes<sup>60</sup> and can serve a legitimate purpose. Collateral consequences are the same and can be just.<sup>61</sup> Their combination necessarily implicates punishment norms and therefore any remedy must reconcile with theories of punishment. For the arrestee who was never convicted, the information can punish without cause. For the convicted person who completed her sentence, the information can perpetuate undeserved punishment.

Expungement regimes offer one means of mitigating these undesirable outcomes. The next section undertakes a discussion of the theoretical roots of public criminal records, before turning to the procedural realities on the ground that characterize the current terrain of expungement relief.

## II. THE ORIGINAL EXPUNGEMENT PARADIGM: PRIVACY AND REHABILITATION

### A. *Criminal Recordkeeping and the Purposes of Punishment*

From its origins to the present-day, the practice of keeping public criminal records has always implicated theories of criminal punishment.<sup>62</sup> Prior to criminal recordkeeping by American jurisdictions, European countries began collecting and storing criminal records in order to identify individuals who reoffended.<sup>63</sup> Criminal recordkeeping served utilitarian goals. Public-safety rationales justified public recordkeeping: the records could be used to prevent future crimes by confirming those who needed to be controlled and by reinforcing that violations of the criminal law undermined the shared social ethos in a given community.<sup>64</sup>

Scholars have shown that by keeping criminal records, the state could track and keep an eye on the most dangerous members of the community and signal to the public the persistent shame that comes with violating the

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<sup>60</sup> See generally Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 8-15 (2016) (describing history and purposes behind public criminal records databases). See *infra* Section II.A. (referencing the connection between punishment theory and public criminal records databases).

<sup>61</sup> Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031, 1034 (2020) (hypothesizing that certain collateral consequences may be just punishment).

<sup>62</sup> See generally Corda, *supra* note 60, at 8 (arguing that the origins and maintenance of criminal conviction record systems have been closely connected to modern theories of recidivism).

<sup>63</sup> JOHN PRATT, *GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW AND SOCIAL CHANGE* 33-34 (1997).

<sup>64</sup> Corda, *supra* note 60, at 10-11 (describing French adoption of penal registers in 1850).

criminal law. Most concretely, public criminal records allowed the government to identify those who should be incapacitated given persistent recidivism.<sup>65</sup> Alessandro Corda, in connecting punishment theory to public criminal records data, has noted that public criminal records “amplify the imposed punishment . . . [by] mak[ing] offending less likely.”<sup>66</sup> Public criminal records were the logical outgrowth of deterrence and incapacitative based theories underlying administration of the criminal law.<sup>67</sup>

But while the collection of criminal record information could be used instrumentally, it could also function as an accessory to the punishment itself. There is reason to believe that this was the reason such records were initially made public. At the very least, Arnould Bonneville de Marsangy, a French penal reformer, conceived things that way. Bonneville thought that the public nature of such records would increase surveillance and ratchet up stigma for the convicted, increasing overall deterrence.<sup>68</sup>

In fairness, the American historical picture seems to be steeped more in a desire for accuracy than a desire to achieve any particular penal objectives.<sup>69</sup> This makes sense given that recordkeeping occurred in a political and legal space that prioritizes transparency and permits public reporting of proceedings in the criminal justice system.<sup>70</sup> Centralization of public criminal records is a relatively recent phenomenon.

Today, the state, in addition to tracking its own activity when enforcing the criminal law, also makes the records available for free and by sale, for the

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<sup>65</sup> PRATT, *supra* note 63, at 33-34; *see also* 5 LEON RADZINOWICZ & ROGER HOOD, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 261-62 (1986) (“The only tangible success to emerge from the legislation on habitual criminals was the system of registration and identification.”).

<sup>66</sup> Corda, *supra* note 60, at 11 (citing ARNOULD BONNEVILLE DE MARSANGY, EXPOSE COMPLET DU SYSTEME DES CASIERS JUDICIAIRES (1848)).

<sup>67</sup> Brian M. Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. 863, 911 (2020) (“These public registries heightened the state’s capacity for surveillance, allowing for partnership with private members of the community.”) (citing Corda, *supra* note 60, at 11 (“[Penal registries] were not meant simply to be an effective technical support for implementation of habitual offender laws. Two further goals were intended: encouraging mutual surveillance within communities and heightening the stigma of conviction in a way that would amplify the imposed punishment and make future offending less likely.”)).

<sup>68</sup> Corda, *supra* note 60, at 11 (citing DE MARSANGY, *supra* note 66).

<sup>69</sup> *See, e.g.*, Corda, *supra* note 60, at 41 (citing SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 40 (1977)) (arguing that the original aims of criminal history information were to facilitate the identification of suspects and defendants as well as enhancing the legitimacy of police forces).

<sup>70</sup> *See, e.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 (1982) (emphasizing the importance of the press and public to gain access to criminal trials); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-73 (1980) (discussing that publicity and openness are important to the functioning of a trial); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (acknowledging the right “to inspect and copy judicial records. . . . [which] preserv[es] the integrity of the law enforcement and judicial processes.”).

very purposes found early on in Continental Europe. These online databases are accessible to almost anyone, enabling state and private actors to do precisely the same public-safety-based line drawing initially conceived of by Continental actors. This, of course, is why the federal government has sought to interface with these online databases.<sup>71</sup> Uniform accuracy assists law enforcement in its pursuit of public safety by allowing for easy identification of those who are dangerous.<sup>72</sup> It also allows private actors to cooperate in pursuing the same objectives, a result that employment law and other private law supports.<sup>73</sup> Further, even where expungement regimes exist, they can maintain exceptions for usage by law enforcement, thereby reaffirming that a primary purpose of criminal recordkeeping is to further assist law enforcement in its public safety objectives.

Public criminal records thus have effects that implicate the degree and severity of the punishment felt by those who have convictions.<sup>74</sup> This can be visible or invisible; digital records that link to court data are particularly troublesome. They operate to condemn in an ongoing fashion, and condemnation is the material of punishment in the American system.<sup>75</sup> As Corda has put it, “[c]riminal history information leaves marks . . . that pervade and affect crucial aspects of . . . lives long after the imposed sentence has been served.”<sup>76</sup> While formalist definitions preclude their classification as “criminal punishment” under existing doctrine, criminal records connect to punitive consequences.<sup>77</sup> At the very least, they “amplify punishment beyond

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<sup>71</sup> Corda, *supra* note 60, at 13 (describing the Law Enforcement Assistance Administration Act as instrumental to the development of the U.S. criminal record infrastructure that exists today).

<sup>72</sup> See, e.g., *Maryland v. King*, 569 U.S. 435, 444-46 (2013) (describing how CODIS, amongst other databases, assists law enforcement to identify individuals within the system).

<sup>73</sup> See, e.g., Benjamin Levin, *Criminal Employment Law*, 39 CARD. L. REV. 2265, 2269 (2018) (arguing that employers, operating as private actors, extend the public function of criminal punishment when rejecting job applicants with criminal records and discharging employees based on non-workplace misconduct; this reality raises concerns about the structural flaws with the criminal system and the legal status of employment).

<sup>74</sup> Radice, *supra* note 21, at 1342 (“[T]he conviction on their public record becomes the most significant part of the criminal punishment because the criminal record can last a lifetime . . .”).

<sup>75</sup> See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1541 (2016) (“The condemnation function is what makes criminal law distinctive; indeed condemnatory punishment is what U.S. courts use to distinguish criminal and civil law in ambiguous cases.”). Kleinfeld cites *Kansas v. Hendricks*, which holds that involuntary commitment is not punishment because it is civil and lacks either retributive or deterrent objectives. 521 U.S. 346, 361-62 (1997).

<sup>76</sup> Corda, *supra* note 60, at 6.

<sup>77</sup> See Murray, *supra* note 61, at 1047 (discussing how collateral consequences can be characterized as punitive even if they are not formally characterized as criminal “punishment”).



the sanctions imposed by the criminal justice system.”<sup>78</sup> Further, they furnish stigma that is essentially an informal mode of punishment.<sup>79</sup>

### B. *Early Expungement Regimes: Privacy and Rehabilitation*

Expungement remedies rose to prominence during the era when the rehabilitative mindset pervaded the criminal justice system,<sup>80</sup> making them a natural response to recordkeeping practices that, without expungement available, would not always manage to distinguish between dangerous and non-dangerous members of the ex-offender population. Policymakers, scholars, and decisionmakers in the system conceived expungement within a rehabilitative sentencing paradigm mindful of broader utilitarian goals for punishment.<sup>81</sup>

Juvenile offenders were the first eligible group because their rehabilitation was thought possible.<sup>82</sup> Expungement had a twofold purpose: incentivizing rehabilitation by promising a second chance and helping the already rehabilitated reenter their communities by removing otherwise existing barriers.<sup>83</sup> The idea was that the rehabilitated could continue to build on the new identity they had begun to forge during the completion of their direct sentence.<sup>84</sup> Notice the corollary to that statement: maintaining a criminal record was no longer useful or necessary for public safety or accuracy purposes because the person was no longer a risk.<sup>85</sup> Expungement simultaneously affirmed and assisted rehabilitation, thereby allowing the

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<sup>78</sup> Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483, 484 (2006).

<sup>79</sup> See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104-05 (2013) (arguing that informal consequences of convictions, including the negative social, economic, medical, and psychological consequences of a conviction, entrench the stigmatizing features of punishment).

<sup>80</sup> Radice, *supra* note 21, at 1326 (“During the 1960s and 1970s, states endorsed a rehabilitative ideal as an integral part of the criminal justice system.”).

<sup>81</sup> See, e.g., Peter D. Pettler & Dale Hilmen, Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121, 124 (1967) (arguing that expungement’s primary objective is to mitigate the penalties public opinion, as opposed to the law, imposes upon one convicted of an offense against society); Isabel Brawer Stark, Comment, *Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response*, 5 SETON HALL L. REV. 864, 865 (1974) (referencing the broader context of “rehabilitative ideal” for the criminal justice system).

<sup>82</sup> Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 481-84 (discussing juvenile expungement measures as responses to the desire to rehabilitate youth offenders).

<sup>83</sup> See, e.g., JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 113-14 (2015) (“The purpose of this policy . . . is to encourage rehabilitation and to recognize that a previously convicted offender has succeeded in turning his life around.”).

<sup>84</sup> See, e.g., *State v. N.W.*, 747 A.2d 819, 823 (N.J. Super. Ct. App. Div. 2000) (discussing how the purpose of the expungement statute was to provide an offender with a “second chance”).

<sup>85</sup> WAYNE LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 83-84 (2009) (describing criminal history information as a way to control dangerous bodies).

individual to reenter the regular community, while allowing the government to pursue other utilitarian-minded criminal law objectives.<sup>86</sup>

Expungement was designed to reward the rehabilitated and have a rehabilitative effect by restoring the individual's "status quo ante."<sup>87</sup> It recognized the positive steps already taken by the individual and helped to clear future obstacles along that positive path.<sup>88</sup> By helping to restore rights and remove barriers to employment or benefits, expungement increased the chances of participation in activities that decreased the odds of recidivism.<sup>89</sup>

This rehabilitative logic manifested itself in the initial expungement regimes that were created. They emphasized scrutiny of the condition and character of the petitioner when assessing whether expungement was appropriate.<sup>90</sup> The goal was to determine whether the person and the person's

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<sup>86</sup> See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1716 (2003) ("Permanent changes in a criminal offender's legal status serve[] to emphasize his 'other-ness.'").

<sup>87</sup> Doe v. Utah Dep't of Pub. Safety, 782 P.2d 489, 491 (Utah 1989); see also Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1057 ("In an attempt to alleviate the effects of such ostracism, and to help offenders reenter society, federal and state governments created expungement laws designed to conceal criminal records from the public.") (internal citations omitted).

<sup>88</sup> See Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 162 (noting how expungement gives youth offenders "an incentive to reform" by "removing the infamy of [their] social standing"); Love, *supra* note 86, at 1710 ("The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights."); Zacharias, *supra* note 82, at 483-84 (referencing the intent that, with a rehabilitation program, "a once-convicted youth would be free to become a productive member of society because [they] would be free of any stigma from [their] criminal conviction."); Mayfield, *supra* note 87, at 1063 ("Expungement, then, may be conceptualized as a natural step in rehabilitation that allows an offender to become sufficiently reformed through reintegration into society.").

<sup>89</sup> See J.J. Prescott & Sonja B. Starr, *The Power of a Clean Slate*, REGULATION: THE CATO REVIEW OF BUSINESS AND GOVERNMENT, Summer 2020, at 28, 29, <https://www.cato.org/sites/cato.org/files/2020-06/regulation-v43n2-3.pdf> [<https://perma.cc/E3WS-PHUW>] (studying evidence in Michigan and finding that expungement recipients have very low rates of recidivism and demonstrate better employment outcomes.); see also Mayfield, *supra* note 87, at 1062 ("The underlying philosophy of expungement has always been to rehabilitate prisoners by providing 'an accessible or effective means of restoring social status.'") (quoting Steven K. O'Hern, Note, *Expungement: Lies That Can Hurt You in and out of Court*, 27 WASHBURN L.J. 574, 576 (1988)). Mayfield describes how expungement arguably has roots in utilitarian punishment theory and particularly rehabilitation theory. *Id.* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 24 (2d ed. 1986)).

<sup>90</sup> See Stephens v. Toomey, 338 P.2d 182, 187-88 (Cal. 1959) (holding that because the petitioner was under probation and thus the criminal proceeding was still outstanding against him, he was not eligible for the expungement he sought); People v. Johnson, 285 P.2d 74, 76 (Cal. Dist. Ct. App. 1955) (finding that the expungement statute did not allow the trial court to consider subsequent criminal episodes when determining whether or not the defendant qualified for an expungement for a particular crime in which he successfully completed probation and reasoning that a person who had a satisfactory background and committed a crime but complied with probation measures completed the reformation processes needed for that particular offense and could be granted an expungement);

criminal record were no longer one and the same, such that grouping the petitioner in with the category of individuals who needed monitoring was no longer appropriate.<sup>91</sup> Proof of fewer or no run-ins with the law, a positive attitude, problem-free time in jail, other noteworthy activities, and the ability to complete the expungement process itself,<sup>92</sup> were signals that someone had been rehabilitated.<sup>93</sup> Expungement, as a unique and narrow remedy, was restricted to the few who had proven themselves worthy of reconsideration. Placing the burden on the petitioner to prove that she was rehabilitated made total sense in this regard.

The earliest judicial decisions entertaining the idea of expunging or sealing criminal records operated from these premises. Judges were frequently in the business of hearing from prisoners, probationers, and others who claimed to be rehabilitated.<sup>94</sup> Arrestees (who did not need to prove rehabilitation, but certainly good character) and extremely low-level offenders (once rehabilitation was proven) began to petition courts in the name of privacy. Courts treaded cautiously, repeatedly denying expungements,<sup>95</sup> and awarding them only after they were convinced of the

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People v. Mojado, 70 P.2d 1015, 1016-17 (Cal. Dist. Ct. App. 1937) (discussing that although the defendant received an expungement for an offense, a prior conviction could be proved in a subsequent prosecution and would have to be given the same effect as if the former accusation had not been expunged). It is important to keep in mind that expungement's link to rehabilitation was not the only possible route. Early cases also judged expungement through a privacy lens. See, e.g., Menard v. Mitchell, 430 F.2d 486, 490, 494 (D.C. Cir. 1970) (discussing that public information stemming from an arrest poses potential injuries to a person's reputation and limits a person's opportunities for schooling, employment, or professional licenses even if they are exonerated. Further, the court recounted how unlawful arrests lead to harassment of "hippies" and civil rights workers); Eddy v. Moore, 487 P.2d 211, 217 (Wash. Ct. App. 1971) (holding that a person who has been acquitted has a right to privacy to the fingerprints officers have taken and photographs of the accused).

<sup>91</sup> See Pettler & Hilmen, *supra* note 81, at 124 ("This being so, it is only natural and just that he is deemed fit to return to his former role in society and assume a position of equality with its members."). Early cases followed the same logic. See generally Stephens, 338 P.2d at 188; Johnson, 285 P.2d at 76; Mojado, 70 P.2d at 1016-17.

<sup>92</sup> See Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1344 (2005) (noting that statutory procedures in Minnesota were "intentionally created to be somewhat cumbersome to help protect the presumption that criminal records remain publicly available").

<sup>93</sup> JACOBS, *supra* note 83, at 114 ("After a certain period of crime-free behavior, the ex-offender has demonstrated that he has put his past offending behind him and deserves reinstatement as a citizen in good standing.").

<sup>94</sup> In 1977, the Minnesota Supreme Court acknowledged that expungement was an equitable remedy under the state constitution. *Minnesota v. R.L.F. (In re R.L.F.)*, 256 N.W.2d 803, 807-08 (Minn. 1977). Four years later, it legitimized trial court expungement. *State v. C.A.*, 304 N.W.2d 353, 357 (Minn. 1981) ("The statute . . . which provides for the return of some criminal records, could be considered to be a kind of 'expungement.'").

<sup>95</sup> See, e.g., Purdy v. Mulkey, 228 So. 2d 132, 136 (Fla. Dist. Ct. App. 1969) (arguing there is no right to judicial expungement); *In re Peabody v. Francke*, 168 N.Y.S.2d 201, 202 (App. Div. 1957) (showing no right to expungement exists in the wake of a reversed conviction and subsequent

petitioner's worthiness. Frankly, early courts struggled with a theory of expungement, ranging from prioritizing privacy<sup>96</sup> considerations (and thereby the petitioner), to a middle ground that focused on rehabilitation, which allowed for simultaneous balancing of state public safety interests with petitioner-centric concerns.<sup>97</sup> They essentially set up a de facto two step inquiry built on rehabilitative logic and privacy concerns: first, a petitioner had to prove he was not a risk; second, if the answer was that he was not, the petitioner needed to show that the maintenance of the criminal record by a governmental agency violated privacy interests so much that the harm to the individual outweighed public safety concerns. Expungement, therefore, became primarily utilitarian.

State legislatures, when codifying expungement regimes, borrowed from these premises.<sup>98</sup> First, expungement was only available to a select minority of prior offenders, and usually only to arrestees without a negative disposition.<sup>99</sup> Having a narrow range of eligible petitioners allowed the state to maintain its ability to pursue public safety goals through the maintenance of a criminal records database.<sup>100</sup> Additionally, arrestees who were not convicted seemingly had the strongest privacy interest to counterbalance public safety concerns held by the state. Some early statutes had expungement of a conviction take the form of dismissal of the charges after completion of a period of probation or parole.<sup>101</sup> Both situations represent firm grounds for the idea that the person was not in need of rehabilitation.

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dismissal), *cert. denied sub nom.* Peabody v. Gulotta, 357 U.S. 941 (1958). See Stark, *supra* note 81, at 870 n. 28 (detailing federal and state cases reluctant to extend expungement remedy without legislative guidance).

<sup>96</sup> See, e.g., *Menard*, 430 F.2d at 494; *Eddy*, 487 P.2d at 217.

<sup>97</sup> See Robin Pulich, *The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1472 (1977) (describing how early cases had varying approaches to granting or denying expungement).

<sup>98</sup> See, e.g., CAL. PEN. CODE §§ 1203-1203.13 (Deering 1949) (setting a high bar and narrow path for expungement); N.J. STAT. ANN. § 2A:164-28 (1951) (same).

<sup>99</sup> See Joseph C. Dugan, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1335 (2015) ("[I]ndividuals could petition for expungement if they were arrested and released without charge or if the charges filed against them were dropped due to mistaken identity, no offense in fact, or absence of probable cause."); see also LOVE ET AL., *supra* note 37, at 113-24 (surveying judicial post-conviction remedies, including expungement). For example, as of 2006, Wisconsin only allowed expungement of misdemeanor convictions if they occurred before age twenty-one. *Id.* at 124.

<sup>100</sup> See, e.g., *Whittle v. Munshower*, 155 A.2d 670, 670 (Md. 1959) ("[I]n the absence of statutory requirement, police records are confidential."); *People v. Pearson*, 244 P.2d 35, 35 (Cal. Dist. Ct. App. 1952) (referencing the idea that police records are confidential and necessary for public safety); *Runyon v. Bd. of Prison Terms and Paroles*, 79 P.2d 101, 101 (Cal. Dist. Ct. App. 1938) (same).

<sup>101</sup> See, e.g., ORE. REV. STAT. § 26-1234 (1940); UTAH CODE ANN. § 77-35-17 (1953) (expungement after time since offense); WYO. STAT. ANN. § 10-1803 (1945) (same); CAL. PEN. CODE § 1203.4 (Deering 1957) (same); IDAHO CODE § 19-2604 (1965) (same), NEV. REV. STAT. § 176.340 (1963) (same); WASH. REV. CODE § 9.95.240 (1957) (same).

The considerations in the early statutes or judge-made remedies suggested a connection to rehabilitative based logic when determining whether expungement was appropriate. In truth, some considerations—like the nature and gravity of the offense—were not strictly utilitarian in concern. But others, such as the damage that the petitioner has endured, the stigmatic effect of criminal record, the activities of the petitioner in spheres of life traditionally considered the domain of the productive (work, recreation, family, etc.), led to balancing interests. Legislatures either directed courts, or courts directed themselves to basically make determinations about the petitioner's future riskiness by scrutinizing whether the petitioner had evidence of already achieved rehabilitation or that the expungement was necessary to complete that process.<sup>102</sup>

These assessments usually entailed judging the moral character of the petitioner to see if rehabilitation had occurred. For example, in California, misdemeanors could be expunged upon a showing of “good moral character.”<sup>103</sup> The statute only allowed expungement as a reward for proving rehabilitation.<sup>104</sup> Interestingly, an early commentator asked if this made any sense, expressing doubt as to whether it was rational to condition expungement on a showing of good behavior while on probation.<sup>105</sup>

Similarly, in New Jersey, the right to expungement, and the ability to apply to licensing bodies or for certain jobs was conditional on the applicant showing a “degree of rehabilitation.”<sup>106</sup> This seems to be the precise goal of the Rehabilitated Convicted Offenders Act, passed by the New Jersey legislature in 1968.<sup>107</sup> Its stated purpose was to “assist rehabilitated convicted offenders to obtain gainful employment, by the elimination of impediments and restrictions . . . based solely upon the existence of a criminal record.”<sup>108</sup>

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<sup>102</sup> See, e.g., *Meinken v. Burgess*, 426 S.E.2d 876, 879 (Ga. 1993) (weighing a variety of factors when considering expungement); *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981) (same); *Murray*, *supra* note 67, at 913 (“In effect, courts were tasked with engaging in cost-benefit calculations about offender riskiness rather than contemplating whether the individual actually deserved to have a public criminal record after serving the initial sentence.”); Walter W. Steele, Jr., *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J.L. REFORM 32, 53-54 (1973) (referencing, in model statute, how waiting period conveyed rehabilitation).

<sup>103</sup> CAL. PEN. CODE § 1203.4a.

<sup>104</sup> See *id.*

<sup>105</sup> See *Pettler & Hilmen*, *supra* note 81, at 128. (“If the law is to be used to combat the practical inequalities confronting one who has been convicted and paid his debt to society, what rational basis exists to make the right of expungement dependent upon probation?”).

<sup>106</sup> N.J. STAT. ANN. §§ 2A:168A-2 to 2A:168A-3 (1971); see *Stark*, *supra* note 81, at 885 (“This right is conditioned on the applicant having demonstrated a degree of rehabilitation which would indicate that engagement in the licensed profession or business would not be incompatible with the welfare of society or the aims and objectives of the licensing authority.”) (citations omitted).

<sup>107</sup> Act of Sept. 4, 1968, ch. 282, 1968 N.J. Laws 828-29.

<sup>108</sup> *Id.* at 829.

This was because allowing the rehabilitated to work did not interfere with “the welfare of society or the aims and objectives of the licensing authority.”<sup>109</sup> As one commentator said at the time, the ability of an ex-offender to seek licensing was contingent upon the standard of rehabilitation assumed by the expungement statute.<sup>110</sup>

Rehabilitative logic also presented itself in the procedures underlying the first-created expungement remedies. As one set of commentators noted, expungement procedures seemed like they were designed to be cumbersome.<sup>111</sup> Onerous procedures simultaneously allowed the state to pursue its goal of maintaining most of its criminal records while providing hope for those who took rehabilitation seriously. The ability to jump through the various hoops that were preconditions to expungement evidenced rehabilitation because it conveyed resilience and compliance with the rule of law, traits that were previously doubted given the petitioner’s prior run-in with the law.

What were these procedures? As alluded to above, they included filing fees, deadlines, significant amounts of paperwork, and the ability to coordinate with state agencies when preparing technically sound petitions.<sup>112</sup> These procedures also constructively required patience, attention to detail, and the ability to articulate one’s cause for expungement in a persuasive fashion. These traits were emblematic of the law-abiding and, therefore, evidence of rehabilitation.

Automatic expungement regimes were not the norm. In New Jersey, petitioners had to file, serve notice on prosecutors and courts involved in the creation of the criminal record, and appear before the court.<sup>113</sup> Other states had similar pre-petition and pre-hearing procedures. Maryland required a formal petition with written notice to law enforcement, leaving time for investigation.<sup>114</sup> Hearings were required for dismissed, *nolle prossed*, or acquitted charges. In New Jersey, an objection by a prosecutor or law enforcement prevented expungement and reduced the only available relief to sealing.<sup>115</sup> That held even if the court found the petition worthy of expungement.<sup>116</sup> In Minnesota, eligibility was determined by the number of

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<sup>109</sup> *Id.*

<sup>110</sup> See Stark, *supra* note 81, at 885.

<sup>111</sup> See Geffen & Letze, *supra* note 92, at 1344.

<sup>112</sup> See, e.g., MO. REV. STAT. § 610.123 (2005) (identifying causes of action for expungement and relevant procedures); MD. CODE ANN. § 27-736 (1992) (same); NEV. REV. STAT. § 179.255 (1973) (same).

<sup>113</sup> N.J. STAT. ANN. § 2A:169-1 (1971) (repealed 1978).

<sup>114</sup> MD. CODE ANN. § 27-736 (1992).

<sup>115</sup> Act of June 28, 1973, ch. 191, 1973 N.J. Laws 609, 610 (codified at N.J. ADMIN. CODE §§ 2A:85-17 to -18) (repealed 1979).

<sup>116</sup> *Id.*

years that the person was free of additional run-ins with the law.<sup>117</sup> Certain crimes were excluded from relief.<sup>118</sup> For some drug-related offenses, New Jersey specifically required no additional criminal activity.<sup>119</sup> For eligible offenses, completion of the statutory period allowed official recognition of rehabilitation.<sup>120</sup> But even if the petitioner met these hurdles, the statute did not guarantee relief: a judge merely had discretion to grant relief.<sup>121</sup>

Judicial discretion in these states required consideration of whether additional behavior by the petitioner since creation of the old criminal record either confirmed or undermined a pattern of criminal behavior.<sup>122</sup> In other words, the judge's decision depended on whether the petitioner could demonstrate rehabilitation by proving a behavioral change.<sup>123</sup> And that was only the first hurdle, as a balancing of state and petitioner interests came next, resembling the precise theoretical construct identified above. And the law placed the burden of persuasion squarely on the petitioner, even if the criminal record only involved an arrest, and shockingly, sometimes if it involved an acquittal.<sup>124</sup>

For example, the Pennsylvania Supreme Court was candid about the rehabilitative premises underlying expungement, and how its standard for assessing expungement petitions was entirely a matter of balancing individual and state interests.<sup>125</sup> Lower courts were tasked with assessing the strength of the case against the petitioner (e.g., how bad was the petitioner and light of the charged criminal act) versus the harm "attendant to maintenance of the arrest record."<sup>126</sup> Similarly, Minnesota reserved the expungement of some low-level convictions for situations where there were no significant public safety concerns.<sup>127</sup>

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<sup>117</sup> See Geffen & Letze, *supra* note 92, at 1349, 1349 n.92 (citing MINN. STAT. § 299C.11(b) (2004)) (referencing waiting periods without additional criminal activity).

<sup>118</sup> *Id.* (referencing several felonies and other high misdemeanors).

<sup>119</sup> 1973 N.J. Laws 609, 610.

<sup>120</sup> See Stark, *supra* note 81, at 894 ("The end of the statutory period marks the point at which an individual receives official recognition of his rehabilitation.").

<sup>121</sup> See *id.* at 888 ("[T]he decision to expunge is at the discretion of the court.").

<sup>122</sup> See Stark, *supra* note 81, at 888 (explaining that an old criminal record can be demonstrative of a pattern of criminal behavior).

<sup>123</sup> *Id.* at 894.

<sup>124</sup> N.J. ADMIN. CODE § 2A:85-15-17a; *cf.* Commonwealth v. D.M., 695 A.2d 770, 773 (Pa. 1997) (granting automatic expungement of charges resulting in acquittal).

<sup>125</sup> See Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981) ("In determining whether justice requires expungement, the Court, in each particular case, must balance the individual's right to be free from the harm attendant to maintenance of the arrest record against the Commonwealth's interest in preserving such records.").

<sup>126</sup> *Id.*

<sup>127</sup> See MINN. STAT. §§ 609A.02-609A.03 (2019) ("[T]he court shall grant the petition to seal the record unless . . . the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record."); State v. C.A., 304 N.W.2d 353, 358 (Minn. 1981) (citing state

In short, regimes limited eligibility to the presumptively rehabilitated and required additional showings relating to privacy and public safety interests.

### III. THE PRESENT EXPUNGEMENT PARADIGM: PRIVACY AND REHABILITATION AGAIN

#### A. *The Promise of Expungement Reform*

The past decade has seen extensive news coverage of the proliferation of public criminal records and their negative effects.<sup>128</sup> States are experimenting with different types of substantive relief. As the Collateral Consequences Resource Center noted in January 2019, these states “pursued a dizzying variety of approaches, reducing waiting periods and expanding eligibility, including for misdemeanors and some low-level felonies, and expediting relief for non-conviction and juvenile records.”<sup>129</sup> This Section will briefly summarize some of these substantive reforms before discussing how expungement procedure lags behind.<sup>130</sup>

Expungement reforms vary across jurisdictions. In total, more than two-thirds of states now permit expungement of convictions. Most of these states permit relief for misdemeanor and felony convictions. Some states have broadened eligibility in terms of the class of offenses that might be sealed or expunged, starting with misdemeanors before moving to felonies. For example, Maryland began by making certain non-violent misdemeanor offenses eligible<sup>131</sup> before extending relief to some felony offenses, without requiring a

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statute that empowers the court to order expungement in cases where said statute provide). For a discussion of Minnesota’s original regime, see Geffen & Letze, *supra* note 92.

<sup>128</sup> See, e.g., J.J. Prescott & Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. TIMES, <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> [<https://perma.cc/9GHH-B6YZ>] (describing criminal records as “major barriers to employment, housing, and education”); Beth LeBlanc, *Expungement Reform Clears Michigan House with Bipartisan Support*, DETROIT NEWS, <https://www.detroitnews.com/story/news/politics/2019/11/05/expungement-reform-clears-michigan-house-bipartisan-support/4169368002/> [<https://perma.cc/7CH2-5S3U>] (describing expungement as the return of offenders’ full citizenship offerings).

<sup>129</sup> MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018 (2019), <https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf> [<https://perma.cc/9AK5-F2TH>].

<sup>130</sup> Given that the main argument of this paper relates to expungement procedure, rather than the substance of expungement reform, I decided not to devote extensive space to detailing all of the changes that have occurred in various jurisdictions. For a detailed discussion, see *id.*

<sup>131</sup> Maryland Second Chance Act of 2015, ch. 313, 2015 Md. Laws 1682, 1684–85 (codified at MD. CODE ANN., CRIM. PROC. §§ 10-301(f)(1)–(12)) (West 2020) (listing “shieldable convictions,” including but not limited to disorderly conduct, possession of a controlled dangerous substance, possession with intent to use drug paraphernalia, and driving without a license).



pardon from the Governor.<sup>132</sup> Other states have similar statutes.<sup>133</sup> Still other states enabled victims of human trafficking to expunge convictions.<sup>134</sup>

Despite momentum towards broadening eligibility, there is great variation amongst states regarding which types of offenses are eligible. Illinois is at the most generous end of the spectrum—extending relief to all but a few very serious felonies.<sup>135</sup> California, on the other hand, limits expungement to extremely low-level drug-offenses.<sup>136</sup> A host of states are somewhere in between, allowing expungement for many misdemeanors and some felonies. The line for most states seems to be precluding expungement for certain violent felonies or sex-based offenses or, at the very least, attaching significantly longer waiting periods for those crimes.<sup>137</sup>

Generally speaking, states determine offense-eligibility by judging the seriousness of the offense, prior criminal record information, and how much time has passed since the offense occurred.<sup>138</sup> These considerations inform the when and how of expungement.<sup>139</sup> For instance, New York allows expungement for nearly all felonies, but only if the conviction is the petitioner's only serious offense.<sup>140</sup> Indiana does something similar, but the

<sup>132</sup> *Id.* § 10-301(e).

<sup>133</sup> See, e.g., ARK. CODE ANN. § 16-90-1401 *et seq.* (2020); COLO. REV. STAT. § 24-72-706 (2020); DEL. CODE ANN. tit. 11, § 4374 (2020); 20 ILL. COMP. STAT. 2630/5.2 (2020); IND. CODE § 35-38-9-2 *et seq.* (2020); KAN. STAT. ANN. § 21-6614 (2019); KY. REV. STAT. ANN. § 431.073 (West 2020); LA. CODE CRIM. PROC. art. 978 A(2) (2020); MD. CODE ANN., CRIM. PROC. § 10-110 (West 2020); MASS. GEN. LAWS ch. 276, § 100A (2020); MICH. COMP. LAWS § 780.621 (2020); MINN. STAT. §§ 609A.02 (2019); MISS. CODE ANN. § 99-19-71 (2019); MO. REV. STAT. § 610.140(2-5) (2019); NEV. REV. STAT. § 179.245 (2019); N.J. STAT. ANN. §§ 2C:52-2 (2020); N.Y. CRIM. PROC. LAW § 160.59 (Consol. 2020); N.C. GEN. STAT. § 15A-145.5 (2020); N.D. CENT. CODE §§ 12.1 32-02(9) (2020); OHIO REV. CODE ANN. §§ 2953.31 *et seq.* (LexisNexis 2020); OKLA. STAT. tit. 22, § 18(A)(12)-(13) (2020); OR. REV. STAT. § 137.225 (2019); 12 R.I. GEN. LAWS §§ 12-1.3-1 *et seq.* (2020); S.C. CODE ANN. § 22-5-920 (2020); TENN. CODE ANN. § 40-32-101(g), (k) (2020); UTAH CODE ANN. §§ 77-40-103 *et seq.* (LexisNexis 2020); VT. STAT. ANN. tit. 13, §§ 7601 *et seq.* (2020); WASH. REV. CODE § 9.94A.640 (2020); W. VA. CODE § 61-11-26 (2020); WIS. STAT. § 973.015; WYO. STAT. ANN. §§ 7-13-1501 to -1502 (2020).

<sup>134</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-909(E)-(F) (2020); ARK. CODE ANN. § 16-90-1412 (2020).

<sup>135</sup> 20 ILL. COMP. STAT. ANN. 2630/5.2 (2020) (detailing exceptions to expungement for crimes against the Stalking No Contact Order Act, the Humane Care for Animals Act, and offenses that would require registration as a sex offender).

<sup>136</sup> CAL. PENAL CODE § 1203.45(a) (West 2020).

<sup>137</sup> Compare WYO. STAT. ANN. §§ 7-13-1501 to -1502 (2020) (prohibiting expungement for, among others, violent felonies), *with* WASH. REV. CODE § 9.94A.640 (2020) (prohibiting expungement for Class B felonies occurring in the last ten years).

<sup>138</sup> See, e.g., IND. CODE ANN. § 35-38-9-2(d) (2020) (describing the requirements for a petition to expunge conviction records). See generally MINN. STAT. ANN. § 609A.02 (2019) (excluding expungement for certain felonies and setting an elapsed time period requirement).

<sup>139</sup> See, e.g., IND. CODE ANN. § 35-38-9-2(b) (2020) (describing crimes the statute does not apply to); see also *id.* § 35-38-9-2(d)(4) (outlining the requirements for expungement of a petitioner's records).

<sup>140</sup> N.Y. CRIM. PROC. LAW § 160.59 (Consol. 2020).

limited public access that petitioners desire really only extends to lower-level misdemeanor offenses.<sup>141</sup> North Carolina and Kentucky have a somewhat more moderate approach, allowing nonviolent, but relatively serious misdemeanor and felonies to be expunged, but only for individuals without prior felony records.<sup>142</sup> Similar gradated statutory regimes exist in Ohio,<sup>143</sup> Michigan,<sup>144</sup> Rhode Island,<sup>145</sup> and Tennessee.<sup>146</sup>

These statutes now represent a new expungement norm, where relief is not reserved just for nonconviction and acquittal charges. Expanded relief came at the same time as statutory reforms limiting the dissemination of any preserved information, and reforms that authorized petitioners to answer questions about their prior convictions in a way that would not damage their ability to obtain licenses or employment.<sup>147</sup> As such, the promise of these statutes is great, providing hope and setting expectations for ex-offenders seeking reentry. But like most legislative reforms, the devil is in the details. Although the types of offenses that are now eligible has generally broadened, states have linked eligibility with other hurdles. For example, Maryland,<sup>148</sup> Minnesota,<sup>149</sup> and Oregon<sup>150</sup> itemize the types of offenses that are eligible, drawing clear lines between those offenses that allow for second chances and those that are too risky to do so. Further, states attach additional conditions like waiting periods and nonrecidivism requirements on the promises made by the statutes.

While substantive expungement reform has occurred, the effect of such changes on access to expungement remains to be seen. The persistence of procedural hurdles—the topic of the next Section—confirms that rehabilitation and public safety concerns remain the dominant paradigm for expunging public criminal records.

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<sup>141</sup> IND. CODE ANN. § 35-38-9-6(a)(1) (2020); *see also* Dugan, *supra* note 99, at 1341–42, nn.129–37 (citing the Indiana statute).

<sup>142</sup> N.C. GEN. STAT. § 15A-145.5 (2020); KY. REV. STAT. ANN. § 431.078 (West 2020).

<sup>143</sup> OHIO REV. CODE ANN. §§ 2953.31 *et seq.* (LexisNexis 2020).

<sup>144</sup> MICH. COMP. LAWS § 780.621(1)–(3) (2020).

<sup>145</sup> 12 R.I. GEN. LAWS §§ 12-1.3-1(2) to -1(3) (2020).

<sup>146</sup> TENN. CODE ANN. § 40-32-101(g), (k) (2020).

<sup>147</sup> Murray, *supra* note 8, at 371–73.

<sup>148</sup> MD. CODE ANN., CRIM. PROC. §§ 10-301(f)(1)–(12) (West 2020).

<sup>149</sup> MINN. STAT. ANN. § 609A.02 (2019).

<sup>150</sup> OR. REV. STAT. § 137.225(5)–(8), (12) (2019).

### B. Modern-Day Procedure: Rehabilitation Prioritized Again

#### 1. Pre-hearing Procedure: Determining Who is Worth the Risk

##### a. *The Filing Paperwork.*

The formal requirements for filing and pursuing an expungement are costly and time-consuming for potential petitioners and likely deter access to relief.<sup>151</sup> These requirements, to name a few, include: gathering and completing several court forms, many of which are not self-explanatory; acquiring fingerprints or other identification information from state and local agencies; and compiling police and court records. These pre-filing formal requirements often require significant sophistication on the part of the individual pursuing the expungement.<sup>152</sup> In effect, they assume that those individuals who have been reformed sufficiently will be able and determined to navigate the process. But as Prescott and Starr have stated, “when criminal justice relief mechanisms require individuals to go through application procedures, many people who might benefit from them will not do so.”<sup>153</sup>

While by no means exhaustive, a few examples from counties across the country show the nature of these restraints on access. A petitioner in Chester County, Pennsylvania, upon viewing the county’s website,<sup>154</sup> will learn that there are several steps to begin the process. The petitioner must prepare a petition and order accurately or face “rejection of petition.”<sup>155</sup> In some jurisdictions, a rejected petition results in a time bar before another one can

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<sup>151</sup> See Prescott & Starr, *supra* note 10, at 2466 n.24 (noting how the Michigan State police suggested low expungement rates existed due to failures to apply). For a greater discussion of how onerous procedures limit access to justice, see *id.* at 2502-04. Cf. Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 217-18 (2016) (discussing how online case resolution mechanisms may increase access to justice by reducing cost and difficulty barriers); J.J. Prescott, *Assessing Access-to-Justice Outreach Strategies*, 174 J. INST. & THEORETICAL ECON. 34, 38 (2018) (explaining that most lawsuits in state courts involve a series of common physical, psychological, and financial barriers that limit access to justice).

<sup>152</sup> See Prescott & Starr, *supra* note 10, at 2503-04.

[P]eople with records are usually struggling with a variety of life challenges. Taking time away from work and childcare responsibilities to go to a police station to be fingerprinted, to make several trips to a courthouse, to find a notary, and to mail all these materials to the right addresses may be simply impossible, or at least difficult enough to be strongly discouraging.

*Id.*

<sup>153</sup> *Id.* at 2478.

<sup>154</sup> *Expungements*, CHESTER CNTY., PA., <https://www.chesco.org/3405/Expungements> [<https://perma.cc/CX46-DF6S>].

<sup>155</sup> *Id.*

be filed.<sup>156</sup> Before filling out the paperwork, petitioners are tasked with obtaining a Pennsylvania State Police background check, although the website does not explain how to do so.<sup>157</sup> Third, the website lists the different types of potential expungements, without offering definitions of each category. Finally, a fee of \$167 is mentioned.<sup>158</sup>

The Maryland court system has a similar site.<sup>159</sup> It immediately makes a cryptic reference to a difference between expungement and shielding without a full explanation.<sup>160</sup> It does contain a six-part video series that appears to be a “how-to-guide.”<sup>161</sup> It also mentions a fee.<sup>162</sup> Texas has a similar site, referring to expungements and non-disclosures, which are different remedies under Texas law.<sup>163</sup>

New Jersey produces a thirty-four-page guide to expungement.<sup>164</sup> The first page quickly contains a disclaimer about the general nature of the guide and states that the content does not replace consulting with a lawyer.<sup>165</sup> It also refers readers to statutory provisions themselves.<sup>166</sup> In terms of formal requirements, the New Jersey guide references obtaining information in advance of filing the petition, obtaining a police background check, filling out multiple forms, filing and serving forms, including proof of service forms, and that is all before attending a hearing.<sup>167</sup> There are directions relating to distributing forms pre-hearing and post-hearing, should an expungement order be issued. There are four forms, and seven copies are requested, requiring careful attention to detail for a lay petitioner unfamiliar with court procedures.<sup>168</sup> While one of the better guides, it nonetheless illustrates the types of difficulties faced by petitioners. It is a dizzying array of references and processes.

Some states are moving away from these onerous requirements, although not enough yet to call it a trend. For example, Pennsylvania’s Clean Slate Act of 2018 creates an automated process to identify cases that are eligible for

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<sup>156</sup> See e.g., ARK. CODE ANN. § 16-90-1413(a)(2) (2020).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Expungement (Adult)*, MD. CTS. (Oct. 2018), <https://mdcourts.gov/legalhelp/expungement> [<https://perma.cc/S3LC-K2YH>].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Expungements and Nondisclosure Order*, TEX. STATE L. LIBR. (Dec. 7, 2020, 9:04 AM), <https://guides.sll.texas.gov/expunctions-and-non-disclosure> [<https://perma.cc/XC9U-CB6Y>].

<sup>164</sup> N.J. CTS., HOW TO EXPUNGE YOUR CRIMINAL AND/OR JUVENILE RECORD (2009), [https://www.nj.gov/corrections/pdf/OTS/FRARA/ParoleHandbook/10557\\_expunge\\_kit-11-2012.pdf](https://www.nj.gov/corrections/pdf/OTS/FRARA/ParoleHandbook/10557_expunge_kit-11-2012.pdf) [<https://perma.cc/E8AD-LZGV>].

<sup>165</sup> *Id.* at 1.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 5-7.

<sup>168</sup> *Id.* at 5-6.

expungement.<sup>169</sup> If identified, relief could be granted without requiring individuals to make individual determinations about eligibility. The Act also allows for automation without the filing of a petition or paying filing fees. California has done something similar for marijuana convictions that involve conduct that is no longer illegal.<sup>170</sup> It remains to be seen whether resource and technological constraints typical for local jurisdictions will make the promise of automation truly a reality. Additionally, automated relief in Pennsylvania only occurs after a ten-year waiting period and for a limited number of offenses.<sup>171</sup> Prior criminal history also has the ability to foreclose automated relief.<sup>172</sup> So the relief is neither immediate nor expansive.

#### b. *Monetary Barriers*

Fines, fees, and costs are also a barrier to expungement. First, consider that the vast majority of petitioners have low incomes; indigence is a widespread problem.<sup>173</sup> In addition to this social reality, expungement statutes or jurisdictional case law<sup>174</sup> can require filing fees.<sup>175</sup> The total cost to a petitioner varies by state, and in some states by county,<sup>176</sup> ranging from thirty to several hundred dollars, and that is usually just for the processing by the court.<sup>177</sup> That amount does not take into account funds needed for travel to different agencies,

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<sup>169</sup> 18 PA. CONS. STAT. § 9122(a)(4)(i), 9122.2 (2020) (providing that the court will give notice to offender that his criminal history will be automatically expunged).

<sup>170</sup> See Lindsay Schnell, *Marijuana Reform: New California Law Gives People with Records a Do-Over*, USA TODAY (Oct. 1, 2018), <https://www.usatoday.com/story/news/2018/09/30/california-passes-landmark-marijuana-law-residents-reclaim-lives/1340729002> [<https://perma.cc/E3Z2-5QNL>] (describing California Assembly Bill 1793, which automated the process for expunging or sealing marijuana convictions).

<sup>171</sup> 18 PA. CONS. STAT. § 9122.2(a)(1) (2020)

<sup>172</sup> *Id.*

<sup>173</sup> See Theresa Zhen, *How Court Debt Erects Permanent Barriers to Reentry*, TALK POVERTY (Apr. 28, 2016), <https://talkpoverty.org/2016/04/28/how-court-debt-erects-permanent-barriers-to-reentry> [<https://perma.cc/T9RX-VWRX>] (“One of the most significant barriers to reentry is the imposition of fines, fees, surcharges, costs, and other monetary penalties . . .”).

<sup>174</sup> See, e.g., *State v. Doe*, 927 N.W.2d 656, 659, 666 (Iowa 2019) (affirming the district court’s denial of petitioner’s motion to expunge her criminal record because Iowa law required her to first pay her court debts).

<sup>175</sup> See, e.g., OR. REV. STAT. § 137.225(2)(c) (2019).

<sup>176</sup> AD HOC COMM., SUP. CT. OF KAN., REPORT ON BONDING PRACTICES, FINES, AND FEES IN MUNICIPAL COURTS 39 <https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/AdHocCommitteeMunicipalCourtsReport.pdf> [<https://perma.cc/WP2T-WLLP>] (“[E]xpungement fees in municipalities ranged from \$25 to \$250. The Committee acknowledges a small-town clerk’s office with part-time prosecutors and a staff that does most everything manually may incur a larger cost for a given service than a large municipality with full time prosecutor and judicial staff, but the disparity is noteworthy.”).

<sup>177</sup> JENNY MONTOYA TANSEY & KATHERINE CARLIN, CODE FOR AMERICA CLOSING THE DELIVERY GAP 24 (2018), <http://s3-us-west-1.amazonaws.com/codeforamerica-cc.msi/documents/Closing-the-Delivery-Gap.pdf> [<https://perma.cc/XBB3-LJCF>] (noting California county processing fees from \$30 to \$240).

time taken off from work, and how other requirements affect income. Of course, expungement is a worthwhile investment, but that presumes awareness on the part of the petitioner of that reality, as well as short-term flexibility to take actions that will pay off in the long run.<sup>178</sup> While petitioners may be able to file in forma pauperis, that status may require judicial process, thereby deterring a petitioner from moving forward given the same access to justice issues discussed in the previous Section. A few jurisdictions have moved towards eliminating fees, but it is by no means the norm.<sup>179</sup>

In addition to filing and paperwork fees, statutes often require that all fines relating to a criminal sentence have been paid.<sup>180</sup> This is so even where restitution was not a crucial component of the sentence. These rules exist despite the fact that fines and costs can derive primarily (or exclusively) from administrative processing associated with any criminal case. Therefore, it is not clear that requiring a zero balance actually indicates which petitioners have successfully completed their sentences. The lack of debt related to a criminal docket is a rough proxy, at best, for determining whether a petitioner was compliant with the terms of his sentence. A few states have moved to eliminate these requirements.<sup>181</sup>

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<sup>178</sup> See Prescott & Starr, *supra* note 10, at 2504 (“[T]hose without cash on hand may not have the liquidity or ability to make such an investment or may be reluctant to do so when the long-term benefits are speculative.”).

<sup>179</sup> See, e.g., ARK. CODE ANN. § 16-90-1419 (2020) (filing fee waived for filing of uniform petition); ARIZ. REV. STAT. ANN. § 13-905(B) (2020) (prohibiting the clerk of the court from charging filing fees); H.R. 5341(D)(1), (1.5), (6)(C), 100th Gen. Assemb. (Ill. 2018) (waiving certain expungement fees and providing that a court cannot deny an expungement petition because of an unpaid court debt, while also arguing that there should be no fees to expunge charges that resulted in acquittal, dismissal, or a conviction that was later reversed or vacated in counties with more than 3,000,000 people); see also *Arizona HB 2312: Relating to Setting Aside a Conviction*, FINES & FEES JUST. CTR. (Mar. 15, 2018), <https://finesandfeesjusticecenter.org/articles/arizona-hb-2312-setting-aside-fee> [<https://perma.cc/ZJ43-EZ75>] (recommending Arizona’s House Bill—which would later become § 13-905(B)); *Illinois HB 5341: Amendment, Criminal Identification Act Section 5.2*, FINES & FEES JUST. CTR. (Feb. 1, 2018), <https://finesandfeesjusticecenter.org/articles/illinois-hb-5341-amendment-criminal-identification-act-section-5-2> [<https://perma.cc/WU6H-VFV7>] (recommending Illinois House Bill 5341).

<sup>180</sup> See, e.g., MO. REV. STAT. § 610.140(5)(3) (2019) (requiring petitioners to pay fines and restitutions before expungement); N.M. STAT. ANN. § 29-3A-5 (2020) (same); COLO. REV. STAT. § 24-72-706(1)(e) (2020) (same); *Frequently Asked Questions About Clean Slate*, CMTY. LEGAL SERVS. OF PHILA. (June 26, 2018), <https://clsphila.org/employment/frequently-asked-questions-about-clean-slate> [<https://perma.cc/UB9A-ASTV>] (advising payment of fines and fees before applying for expungement); Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS’N (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs> [<https://perma.cc/KS4S-JY6V>] (finding that people cannot vacate their records to regain their rights until they pay their financial obligations to the court).

<sup>181</sup> 20 ILL. COMP. STAT. ANN. 2630/5.2(d)(6)(C) (2020) (declaring that a court will not deny an expungement petition because the petitioner has not paid a legal financial obligation); N.J. STAT. ANN. § 2C:52-5.3 (2020) (ordering that if a criminal debt has not been satisfied due to some reason other than non-compliance, and ten years has passed since the crime, the court can still grant the expungement application).

c. *Waiting Periods.*

Decreasing waiting periods has been a popular reform and usually correlates to different types of public criminal records. States have experimented in this field, with some opting for graduated schemes instead of uniformity. A spectrum exists here as well—some states have waiting periods as short as several months, whereas others require ten or more years before eligibility. Waiting periods almost always require “crime-free” terms, and can extend beyond what recent studies have shown is the likely timeframe for reoffending. Nevertheless, the theory behind waiting periods is the same that supported expungement half a century ago: those who have not recidivated and shown good behavior are now worth the risk.

Nearly all of the states that expunge convictions have required waiting periods. For example, Illinois coupled its broad eligibility provisions with a three-year waiting period for nearly every type of offense.<sup>182</sup> Maryland accompanied its substantive reforms with a three-year waiting period following completion of the last sentence.<sup>183</sup> Louisiana added a five-year waiting period.<sup>184</sup> Kansas has a three to five-year window.<sup>185</sup> Missouri, which chose to shorten its waiting period, has a three-year period for misdemeanors and a seven-year period for felonies.<sup>186</sup> Minnesota linked waiting periods to the seriousness of the offense, opting for a graduated scheme.<sup>187</sup> Colorado has a similar scheme with a variable waiting period depending on the nature of the offense.<sup>188</sup> Other states have ranges from one year to twenty.<sup>189</sup> The norm is somewhere between three to five years. Interestingly, that resembles the data with respect to the risk of reoffending: recidivism rates can be highest in the earliest years after release.<sup>190</sup> Time is thus one factor in considering riskiness.

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<sup>182</sup> 20 ILL. COMP. STAT. ANN. 2630/5.2(c)(3)(C).

<sup>183</sup> MD. CODE ANN., CRIM. PROC. § 10-303(A) (West 2020).

<sup>184</sup> LA. CODE CRIM. PROC. art. 977(A)(2) (2020).

<sup>185</sup> KAN. STAT. ANN. § 21-6614(2)(c) (2019).

<sup>186</sup> MO. REV. STAT. § 610.140(5)(1) (2019).

<sup>187</sup> MINN. STAT. ANN. § 609A.02(3)(a)(3)-(5) (2019).

<sup>188</sup> COLO. REV. STAT. § 24-72-706(b) (2020).

<sup>189</sup> Compare OHIO REV. CODE ANN. § 2953.32(a)-(c) (LexisNexis 2020) (requiring a waiting period of one to three years or four to five if the offender had been convicted of multiple felonies), with OR. REV. STAT. § 137.225(5)(a)(A)(i) (2019) (requiring a waiting period of one to twenty years).

<sup>190</sup> Bill Keller, *Seven Things to Know About Repeat Offenders*, MARSHALL PROJECT (Mar. 9, 2016, 11:00 PM), <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders> [https://perma.cc/Z37G-NPXF] (noting that almost half of federal inmates are arrested again within five years of release).

d. *Prosecutorial Intervention.*

Statutes enable prosecutors to intervene during the expungement process, thereby potentially resulting in an additional hill for a petitioner to climb. Although some well-known prosecutors have become semi-partners during the expungement process,<sup>191</sup> the norm remains that prosecutors can object to expungement for substantive and technical reasons.<sup>192</sup>

These mechanisms have been discussed in another Article,<sup>193</sup> but it is worth reiterating how much power prosecutors retain with respect to preventing or, at the very least, stalling expungement.<sup>194</sup> Several states permit prosecutors to force a hearing on the merits through objection.<sup>195</sup> This holds for expungements relating to convictions and non-conviction charges. For example, Ohio allows prosecutors to object, thereby requiring a court to engage in a balancing test that permits denial of an expungement petition for plenty of purposes.<sup>196</sup>

In some states, prosecutors essentially possess constructive veto power over an expungement petition. Michigan, in the case of non-conviction or acquitted charges, allows prosecutors to prevent expungement through objection.<sup>197</sup> Many states resemble Georgia, where prosecutors have a fixed period of time during which they can object to a petition for technical reasons<sup>198</sup>; if the prosecutor does so, a formal notice is sent to the petitioner,<sup>199</sup> potentially having a chilling effect. At best, the petitioner then faces a clear and convincing evidentiary standard in front of a court.<sup>200</sup> Other states involve prosecutors by essentially giving them the responsibility to prescreen petitions on the merits before they go to the courts. Colorado and Vermont, for example, permit automatic granting of expungement if a prosecutor does

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<sup>191</sup> *Sealing a Criminal Conviction*, MANHATTAN DIST. ATT'YS. OFF., <https://www.manhattanda.org/sealing/> [<https://perma.cc/GL8F-6MVH>]; Press Release, Manhattan Dist. Att'ys. Off., Through Groundbreaking Class Action, Hundreds of New Yorkers Have Old Marijuana Convictions Sealed (Aug. 12, 2019), <https://www.manhattanda.org/through-groundbreaking-class-action-hundreds-of-new-yorkers-have-old-marijuana-convictions-sealed/> [<https://perma.cc/R46T-C3WP>].

<sup>192</sup> See generally Murray, *supra* note 17.

<sup>193</sup> *Id.*

<sup>194</sup> The D.C. Code is a good example of how prosecutorial review and potential objection adds delay to the process. See, e.g., D.C. CODE §§ 16-805(b-e) (2020).

<sup>195</sup> See, e.g., GA. CODE ANN. § 35-3-37(n)(3) (West 2018) (allowing prosecutors to decline an individual's request to their criminal history record information, which leads to a civil action to remedy the prosecutorial discretion); but see COLO. REV. STAT. § 24-72-704(1)(c)(I)-(II) (2020) (allowing judges to determine whether grounds for a hearing exist).

<sup>196</sup> OHIO REV. CODE ANN. §§ 2953.52-55 (LexisNexis 2020).

<sup>197</sup> MICH. COMP. LAWS § 28.243(8)-(10) (2020).

<sup>198</sup> GA. CODE ANN. § 35-3-37(n)(2) (West 2018).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* § 35-3-37(n)(3).



not object.<sup>201</sup> In several jurisdictions, courts can only expunge without a hearing if prosecutors do not furnish an initial objection.<sup>202</sup> This means adversarial actions by the prosecutor mandate hearings that are time-consuming, sophisticated, and difficult for lay petitioners to navigate.<sup>203</sup>

This potential hurdle exists even in states that have passed recent substantive reforms, including with automated relief. For example, after California passed a sweeping law that would allow for the expungement of old marijuana convictions, the California Attorney General was tasked with sending information to local district attorneys about which cases were eligible. But local prosecutors could challenge the expungement,<sup>204</sup> thereby subjecting otherwise-immediate relief to the discretionary review of one public official who might have different policy views than the legislature on the issue. The same holds for the Clean Slate Act in Pennsylvania.<sup>205</sup>

On the flip side, some states have left room for prosecutors to partner with petitioners. For example, Texas gives prosecutors unilateral authority to waive otherwise existing waiting period requirements.<sup>206</sup> Courts shall issue expungements for certain non-conviction charges if the prosecutor does so.<sup>207</sup> Delaware allows expungement if prosecutors initiate the process by filing a

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<sup>201</sup> COLO. REV. STAT. § 24-72-704(1)(c)(I) (2020); VT. STAT. ANN. tit. 13, § 7602(a)(3) (2020).

<sup>202</sup> See ARIZ. REV. STAT. ANN. § 13-907.01(B) (2020) (“If the prosecutor does not oppose the application, the court may grant the application and vacate the conviction without a hearing.”); ARK. CODE ANN. § 16-90-1413(b)(2)(B)(i) (2020) (“If notice of opposition is not filed, the court may grant the uniform petition.”); CAL. PENAL CODE § 851.8(d) (West 2020) (“In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading.”); see also 20 ILL. COMP. STAT. ANN. 2630/5.2(d)(6)(B) (2020) (requiring the court to grant or deny a petition if no objection is filed); IND. CODE ANN. § 35-38-9-9(a) (2020) (allowing a court to grant a petition for expungement without a hearing if the prosecutor does not object); MD. CODE ANN., CRIM. PROC. § 10-303(d)(2) (West 2020) (allowing a court to grant a petition for shielding criminal records if the State’s Attorney does not file an objection); N.J. STAT. ANN. § 2C:52-11 (2020); UTAH CODE ANN. § 77-40-107(7) (LexisNexis 2020) (allowing a court to grant a petition for expungement without a hearing if no objection is received); VA. CODE ANN. § 19.2-392.2(F) (West 2020) (allowing a court to enter an order of expungement without conducting a hearing if the prosecutor gives written notice that they (1) do not object to the order and (2) the continued existence of the record would be unjust to the petitioner).

<sup>203</sup> See Murray, *supra* note 17, at 2848 (“Objections to expungement, warranted or not, often require that the matter be listed for a hearing, thereby demanding the presence of both parties and an evidentiary showing.”).

<sup>204</sup> LOVE & SCHLUSSEL, *supra* note 129, at 11.

<sup>205</sup> *Id.* at 10-11.

<sup>206</sup> TEX. CRIM. PROC. CODE ANN. § 55.01(a)-(b) (West 2020).

<sup>207</sup> *Id.*

petition.<sup>208</sup> And several other states allow for automatic expungement if the prosecutor does not object.<sup>209</sup>

## 2. Hearing Standards: Public Safety Calculations and the Burden of Proof

Under most state statutes, expungement petitions can progress to a hearing in front of a judge. The paths to a hearing are numerous. Some statutes require hearings, while others reserve them for when the prosecutor objects to expungement. Regardless, expungement law varies from state to state with respect to how courts are tasked with adjudicating petitions. Some state courts have crafted standards of review, whereas other states have statutes that prescribe the consideration of certain factors. The common theme is balancing: courts assess whether the potential harm to the petitioner caused by a public criminal record outweighs the state's interest in keeping the record in place. That balancing then turns into an assessment of the riskiness of granting the petition, based on the positive characteristics put forth by the petitioner. In many jurisdictions, the burden falls on the petitioner to demonstrate why a conviction should be expunged.<sup>210</sup>

### a. *The Balancing Approach.*

Balancing tests come from statutes themselves or through case law applying the statutes. For example, the D.C. Code outlines factors that courts must consider when determining whether an expungement petition should be granted. The Code references “the interests of justice” before listing three umbrella interests: (1) “the interests of the movant”; (2) “the community’s interest in retaining access to those records, including the interest of current or prospective employers . . . and the interest in promoting public safety”; and (3) “the community’s interest in furthering the movant’s rehabilitation and enhancing the movant’s employability.”<sup>211</sup> Thus, immediately the petitioner’s privacy, the community’s interest in public safety, and the petitioner’s level of rehabilitation guide the court’s discretion. But then the statute goes further, authorizing scrutiny into the nature of the case and the “history and characteristics” of the movant, including the movant’s “character; physical and mental condition; employment history; prior and subsequent conduct; history relating to [substance abuse]; criminal history; and efforts at rehabilitation . . . .”<sup>212</sup> Notice that almost all of the sub-factors relate to what

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<sup>208</sup> DEL. CODE ANN. tit. 11, § 4374(h) (2020).

<sup>209</sup> See *supra* note 202 and accompanying text.

<sup>210</sup> See, e.g., D.C. CODE §§ 16-803(2)(G)(i)(1)-(3) (2020) (placing the burden on the movant for petitions relating to convictions).

<sup>211</sup> § 16-803(h)(2)(A)-(C).

<sup>212</sup> § 16-803(h)(2)(A)-(C)(i)-(vii).

the petitioner can demonstrate in terms of rehabilitation, and to an assessment of riskiness.

Other jurisdictions have similar statutory schemes. For example, New Mexico's new law permitting expungement of convictions reflects a recent trend tying mandatory expungement to judicial findings of minimal risk, using criminal history as a proxy for risk. After a hearing, courts "shall" issue an order "if the court finds that" there are no charges pending, justice will be served, and no other criminal conviction has occurred for a certain period of time.<sup>213</sup> The statute prescribes clear rules regarding the necessary window of time after the conviction sought to be expunged.<sup>214</sup> To determine whether justice will be served, the court "shall consider" the nature and gravity of the offense, the petitioner's age, criminal history, and employment history, the length of time that has passed since completion of the sentence, any specific adverse consequences the petitioner might face, and the district attorney's objections.<sup>215</sup>

This regime is similar to new laws in other states that promise broader eligibility but are still subject review to concerns about privacy and risk, and task courts with assessing rehabilitation. Under Arkansas law, similar factors guide decisions relating to expungement of felony convictions, while also instructing the judge to consider "[a]ny other information . . . that would cause a reasonable person to consider the person a further threat to society."<sup>216</sup> Minnesota explicitly references "the risk . . . the petitioner poses to individuals or society" and "the steps taken by the petitioner toward rehabilitation . . ."<sup>217</sup> Colorado's statute for expunging convictions, effective in August 2019, references similar factors to New Mexico's, noting how a court should consider the "privacy of the defendant," "criminal history," the severity of the offense, and the quantity of convictions.<sup>218</sup> New Hampshire's law, effective August 2018, authorizes expungement when it will "assist in the petitioner's rehabilitation."<sup>219</sup> Illinois's law, effective January 1, 2020, and considered one of the more progressive expungement regimes, parrots the factors in the previous states, referencing "the strength of the evidence supporting the defendant's conviction," the state's reasons for retaining the record, "the petitioner's age, criminal record history, and employment history," the length of time between conviction and the petition, and any

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<sup>213</sup> N.M. STAT. ANN. § 29-3A-5C (2020).

<sup>214</sup> § 29-3A-5C(4).

<sup>215</sup> § 29-3A-5E. Notably, these factors look very similar to those outlined by the Pennsylvania Supreme Court in *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981) and used by other states.

<sup>216</sup> ARK. CODE ANN. § 16-90-1415(b)(1)(E) (2020).

<sup>217</sup> MINN. STAT. ANN. § 609A.03(5)(c)(1)-(12) (2019). It also references the petitioner's record of employment, community involvement, and the nature and circumstances of the crime. *Id.*

<sup>218</sup> COLO. REV. STAT. ANN. § 24-72-706(1)(g) (2020).

<sup>219</sup> N.H. REV. STAT. ANN. § 651:5(I) (LexisNexis 2018).

specific consequences faced by the petitioner if the petition is denied.<sup>220</sup> Like the other states, the majority of Illinois's factors focus on the privacy interests of the petitioner and whether the petitioner's lifestyle and employment prospects suggest minimal risk. Several other states import factors like these when considering the expungement of convictions, confirming that the privacy/public safety/rehabilitation paradigm persists.<sup>221</sup>

Vermont's regime takes a slightly more amorphous approach by statute. Like New Mexico, it links judicial discretion to a judicial finding of nonrecidivism since completion of a sentence, the payment of all fines and restitution, and that "expungement . . . serves the interests of justice."<sup>222</sup> The last phrase is not given clear meaning by the statute, leaving more room for consideration of a wide range of factors. But the rest of the statute links expungement to periods of nonrecidivism. Thus, like in New Mexico, even when the statute tries to limit judicial discretion, the privacy/public safety/rehabilitation paradigm continues to dominate decision-making.

Not all states retain these multi-factored tests. Some states have limited judicial discretion to determining whether the petitioner has complied with technical requirements,<sup>223</sup> plus adherence to the waiting period. Indiana has

<sup>220</sup> 20 ILL. COMP. STAT. ANN. 2630/5.2(d)(7) (2020).

<sup>221</sup> See KAN. STAT. ANN. § 21-6614(h)(1)-(3) (2019) (referencing nonrecidivism, "the circumstances and behavior of the petitioner," and the "public welfare"); KY. REV. STAT. ANN. § 431.073(4)(a)(1-4) (West 2020) (requiring expungement for felony convictions to be consistent with "welfare and safety of the public," and the petitioner's "behavior since the conviction"); MICH. COMP. LAWS § 780.621(14) (2020) (referencing "circumstances and behavior of an applicant" and the "public welfare"); MINN. STAT. ANN. § 609A.03(5)(a) (2019) (referencing benefit to the petitioner that counterbalances disadvantages to public safety); MISS. CODE ANN. § 99-19-71(2)(b) (2019) (requiring proof of rehabilitation for the convicted offense); MO. REV. STAT. § 610.140(5)(1)-(6) (2019) (referencing nonrecidivism, the "petitioner's habits and conduct" indicate that he is "not a threat to the public safety" and "public welfare"); N.Y. CRIM. PRO. LAW § 160.59(7)(d), (f)-(g) (Consol. 2020) (referencing the "character of the defendant, including any measures that the defendant has taken toward rehabilitation," the "impact of sealing . . . upon . . . rehabilitation and upon his or her successful and productive reentry and reintegration into society," and "the impact of sealing . . . on public safety"); N.C. GEN. STAT. § 15A-145(b) (referencing "good behavior"); § 15A-145.5(c) (referencing "good moral character"); OHIO REV. CODE ANN. § 2953.32(e)(2) (LexisNexis 2020) (referencing judicial determination of "rehabilitation of an applicant"); OKLA. STAT. tit. 22, § 19(C) (referencing "harm to privacy of the person"); OR. REV. STAT. § 137.225(3) (2019) (referencing "the circumstances and behavior of the applicant"); 12 R.I. STAT. § 12-1.3-3 (2020) (noting discretion of court to determine whether petitioner has "exhibited good moral character" and "rehabilitation has been attained to the court's satisfaction"); TENN. CODE ANN. § 40-32-101(g)(5) (2020) (referencing "interest of justice and public safety"); UTAH CODE ANN. § 77-40-107(8) (LexisNexis 2020) (implying rehabilitation for drug offenses); W. VA. CODE § 61-11-26(d)(10) (2020) (requiring petitioner to aver in petition the "steps . . . taken . . . toward personal rehabilitation"); WYO. STAT. ANN. § 7-13-1501(g) (2020) (focusing on whether petitioner is a "substantial danger").

<sup>222</sup> VT. STAT. ANN. tit. 13, §§ 7602(b)(1)(A)-(D) (2020).

<sup>223</sup> N.J. STAT. ANN. § 2C:52-14 (2020) (relying on statutory bases, rather than judicial discretion, to deny expungement).

such an approach, using the waiting period as the primary determinant of whether a court shall issue an expungement.<sup>224</sup> Kentucky and Maryland have a similar approach, linking automatic expungement of certain misdemeanor convictions to compliance with the waiting period.<sup>225</sup>

b. *Burdens of Proof*

Jurisdictions either place the burden of proof squarely on the petitioner or move it between the state and the petitioner depending on the type of charge and whether the record is a conviction rather than arrest. For example, the D.C. Code moves the burden from the state to the petitioner if the charge is a conviction.<sup>226</sup> Arkansas places the burden on the state for arrests and misdemeanor convictions, but on the petitioner for felony convictions.<sup>227</sup> Oregon places the burden on the state for certain types of convictions, like third degree robbery or attempted assault, if the procedural components of the petition are otherwise valid.<sup>228</sup> Kansas's law, effective June 2019, requires petitioners to meet a "clear and convincing" standard for felony convictions.<sup>229</sup> Minnesota<sup>230</sup> and West Virginia<sup>231</sup> have the same standard.

Delaware, in a new law effective in 2020, places the burden on the "petitioner to allege specific facts in support of that petitioner's allegation of manifest injustice."<sup>232</sup> If the petitioner can make that showing, the court must grant the expungement. Although no reported case law exists for the new law, case law from the statute that preceded it, which had reserved expungement to non-conviction charges under the same standard, reiterated the petitioner's burden. It referenced the damaging effects of a criminal record on the reputation of a non-convicted person without a criminal history as crucial to that showing.<sup>233</sup> At the very least, the petitioner must supplement the petition for expungement with an affidavit containing specific facts supporting an assertion of "manifest injustice."<sup>234</sup>

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<sup>224</sup> See, e.g., IND. CODE ANN. § 35-38-9-2(e) (2020) (for misdemeanor convictions); *id.* § 35-38-9-3(e) (for class D felony convictions); see also NEV. REV. STAT. § 179.245(5) (2019) (using a waiting period to determine whether the court can seal criminal records).

<sup>225</sup> KY. REV. STAT. § 431.078(4)(a)-(d) (West 2020); MD. CODE ANN., CRIM. PROC. § 10-303(e)(2) (West 2020).

<sup>226</sup> D.C. CODE §§ 16-803(2)(G)(i)(1)-(3).

<sup>227</sup> ARK. CODE ANN. § 16-90-1415(a)-(e) (2020).

<sup>228</sup> OR. REV. STAT. § 137.225(12) (2019).

<sup>229</sup> KY. REV. STAT. ANN. § 431.073(4)(a) (West 2020).

<sup>230</sup> MINN. STAT. ANN. § 609A.03(5) (2019).

<sup>231</sup> W. VA. CODE § 61-11-26(h) (2020).

<sup>232</sup> DEL. CODE ANN. tit. 11, § 4374(f) (2020).

<sup>233</sup> *Jones v. Delaware*, No. N18X-01-018, 2018 WL 2684073, at \*2 (Del. Super. Ct. June 4, 2018).

<sup>234</sup> See *Webster v. Delaware*, No. K16X-06-002, 2016 WL 5939166, at \*1 (Del. Super. Ct. Sept. 2, 2016) (noting that the burden rests on the petitioner and that an affidavit with specific facts was necessary to meet it).

Nevada is on an island with its establishment of a “rebuttable presumption that . . . records should be sealed if the applicant satisfies all statutory requirements for the sealing of records.”<sup>235</sup> New Jersey represents a moderate approach, requiring the state to prove by a preponderance of the evidence that its need for the record to be available outweighs the petitioner’s interest.<sup>236</sup>

The aforementioned hearing procedures and allocations of the burden of proof indicate that public safety considerations and the rehabilitation of the petitioner are front and center when assessing the merits of an expungement petition, and that privacy interests, juxtaposed with the interests of the state, lurk in the backdrop. The reality is that a majority of state expungement laws continue to operate in that paradigm, resulting in onerous procedures, likely contributing to the uptake gap.

#### IV. A NEW PARADIGM: RETRIBUTIVE EXPUNGEMENT

The preceding sections illustrate the limits of the public safety and privacy-based paradigm that has characterized expungement for over a half century. Procedures have resulted in burdensome obstacles that do not fully comport with the promise of expungement. These procedures are tethered to the initial rehabilitative logic underlying expungement, undermining the promise of the remedy by requiring individuals to prove their mettle. This mistakenly focuses the inquiry on the individual’s ability to prove rehabilitation, within a broader utilitarian calculus, rather than obligating the state to justify and police the limits of the punishment it imposes through the criminal justice system. Instead of solely using rehabilitation as the basis for understanding the place of expungement in criminal law, a different lens—retributive expungement—can help refocus procedure to comport with the promise of substantive expungement reform by placing the onus on the state.<sup>237</sup> This Part outlines the parameters of a retributivist approach to expungement, suggesting that retributivist constraints—long applicable in the sentencing context—can help further the promise of expungement for those who deserve it.

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<sup>235</sup> NEV. REV. STAT. § 179.2445(1) (2019).

<sup>236</sup> See *In re LoBasso*, 33 A.3d 540, 548 (N.J. Super. Ct. App. Div. 2012) (“The State must prove the predominating need for record availability by a preponderance of the evidence.”).

<sup>237</sup> Joy Radice advances a similar argument. See Radice, *supra* note 21, at 1331 (“[I]f our cultural perception of a person’s conviction status is to be changed, the state also needs to play a role, and even take the lead, in removing the criminal stigma.”).

## A. Retributivist Constraints

Retributivist principles can help counteract the stigma associated with a public criminal record by infusing procedures with renewed focus on blameworthiness and proportionality and the obligations of the state after the completion of a sentence. These principles are applicable to the stigma that persists after a direct sentence has been completed.<sup>238</sup> That understanding leaves room for retributivist concepts of blameworthiness and proportionality to supplement already useful public safety-based critiques.<sup>239</sup> To be clear, the issue is not whether criminal record history information should be wholly private; rather, the central concern is for how long the information should remain public,<sup>240</sup> when a petitioner should be presumptively afforded a remedy, and how that remedy should come about.<sup>241</sup>

What principles within retributivism might be helpful? While there are many different types of retributivism, they share some common themes.<sup>242</sup> These include: recognizing offender dignity, the dual function of punishment as responsive to desert and restorative of the social equilibrium that was violated, proportionality, and that blameworthiness should help tailor punishment.<sup>243</sup> These premises have been developed by several thinkers, either as a positive case for retributivism or to clarify how retributivist principles can help constrain punishment otherwise justified on utilitarian grounds from running amok, which is often called “negative retributivism.”<sup>244</sup> At the very least, these premises start from the notion that punishment must

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<sup>238</sup> Douglas N. Husak, *Already Punished Enough*, 18 PHIL. TOPICS 79, 95 (1990) (“The dependence theory allows the state to make whatever adjustments . . . to ensure that the overall quantum of punishment satisfies the demands of proportionality.”).

<sup>239</sup> Utilitarian concepts of proportionality certainly can rationalize easing expungement. The costs of stigma are high. Such stigma likely correlates with recidivism, and the deterrent value of public criminal records is difficult to decipher, thereby calling into question their justification for an extended period of time. For a similar argument with respect to mitigating collateral consequences, see Hugh LaFollette, *Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. APPLIED PHIL. 241 251 (2005).

<sup>240</sup> See Corda, *supra* note 60, at 44 (discussing proportionality and public criminal records availability).

<sup>241</sup> The when and the how of expungement are necessarily procedural questions, which is the focus of this Article, rather than the breadth of substantive reform, which, amongst other topics, includes the length of time that a record can or should remain public.

<sup>242</sup> See Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464, 474 (1988) (labeling retributive justice as a “cluster concept.”).

<sup>243</sup> Murray, *supra* note 61, at 1036-37 (discussing shared premises of retributivism).

<sup>244</sup> See Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179 (Ferdinand Schoeman ed. 1987) (“Retributivism is the view that punishment is justified by the moral culpability of those who receive it.”) (*italics omitted*). The various types of retributivism that exist are beyond the scope of this Article.

account for inherent human dignity, refrain from instrumentalization, and be calibrated to blameworthiness.<sup>245</sup>

The extended existence of public criminal records implicates retributivist principles in a couple of ways. First, permanent availability of conviction information, without careful distinctions between the types of convictions, can lead to state-permitted<sup>246</sup> punishment beyond the desert basis. Punishment should be correlated to blameworthiness and proportionality principles. Expungement regimes must make careful distinctions between the nature of offenses, and should refrain from blanket classifications by the grade of an offense. For example, the term felony connotes very different levels of conduct. Some felonies are violent, some are not. Some involve clear victims, others do not. Many crimes classified as felonies today were not felonies throughout American history.<sup>247</sup> Additionally, most criminal statutes require a mens rea and distinguish between levels of culpability. Finally, given that the vast majority of convictions are obtained via plea deal, the name of a conviction is not a proxy for blameworthiness.<sup>248</sup> Thus, even if the stigma from a public criminal record is considered part of the desert basis, linking it to generic terminological categories, such as all felonies, misuses labels as a proxy for blameworthiness.

With respect to proportionality, if direct sentences are meant to be proportionate, and stigma by virtue of the public criminal record goes beyond that, then the state is at least permitting extra punishment, if not licensing it when it furnishes criminal record data for a profit.<sup>249</sup> In the case of arrests,

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<sup>245</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 492 (1997) (explaining that by forgoing punishment, rehabilitation acknowledges and forgives the offender's blameworthiness); Michael Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First Century America*, 47 CRIME & JUST. 119, 128 ("There are many different kinds of retributive theory, but they share the view that moral blameworthiness is an important consideration in determining just punishments.").

<sup>246</sup> A common objection is the notion that in a liberal, democratic society, the operation of the criminal law must remain public, and that public criminal records are not punishment. My view is that this falls into the camp of the state permitting punishment that goes beyond the formal parameters of the criminal law. In other words, there is a difference between criminal punishment and punishment. But both require justification, as both involve activity of the state, just in different ways (commission v. permission). Given that both results implicate state interests, condemnation, and can be regulated by the state, the state has a role to play.

<sup>247</sup> See *United States v. Watson*, 423 U.S. 411, 439-40 (1976) (J. Marshall, dissenting) (noting the substantive changes in felonies).

<sup>248</sup> Radice, *supra* note 21, at 1337 ("[A] criminal history is merely a jumble of codes, at times inaccurate, that tells a person nothing about how the information on the report relates to risk."); Jacobs, *supra* note 27, at 74 (comparing criminal record history information to the raw data on a credit report).

<sup>249</sup> NIGEL WALKER, *PUNISHMENT, DANGER & STIGMA: THE MORALITY OF CRIMINAL JUSTICE* 161 (1980) ("[I]f the punishment ordered by the court is meant to be commensurate or proportional to the offen[s]e, any extra hardship resulting from stigma will distort the balance between



where the desert basis is questionable, permitted punishment risks undermining the entire criminal project, not to mention weakening the presumption of innocence.<sup>250</sup> Proportionality constraints require a second look at this problem.

There are two ways to think about proportionality from a retributivist standpoint: cardinal and ordinal proportionality. Cardinal proportionality is the principle that a sentence should be no more severe than is deserved based on the seriousness of the crime and the offender's culpability.<sup>251</sup> The word that might best describe this concept is "commensurate." This idea can be elusive. Does it reflect the *lex talionis*?<sup>252</sup> Is it measured by the amount of harm caused to a victim? What if the crime did not involve a victim or measurable tangible harm? In other words, how can one measure the difference in degree required for cardinal proportionality? For some, these difficult, epistemic questions render the entire retributive system useless.<sup>253</sup> For others, they partner desert with humility, thereby limiting the retributive project.<sup>254</sup> The latter approach certainly comports with modern sensibilities against over-punishment and presuppositions underlying liberal democratic regimes.

Although the concept of proportionality might be difficult to fully grasp, that does not render it unworthy of consideration. For it may be the case that while proportionality cannot be definitively quantified, ranges or spectrums can at least be intuited and then coupled with humility.<sup>255</sup> This is the basis of

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the offen[s]e and the punishment."); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 14 (1993) ("The censure and the hard treatment are intertwined in the way punishment is structured.").

<sup>250</sup> Diane Becker Potash, *Maintenance and Dissemination of Criminal Records: A Legislative Proposal*, 19 UCLA L. REV. 654, 668 (1972).

<sup>251</sup> ZACHARY HOSKINS, BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION 81 (2019).

<sup>252</sup> The *lex talionis* conveys a principle of retaliation, often measured by the harm initially inflicted. It arguably has Biblical roots. See W. Justin Ilboudo, The Lex Talionis in the Hebrew Bible and Jewish Tradition, [https://www.bc.edu/content/dam/files/research\\_sites/cjl/pdf/Justin%20Ilboudo\\_Research%20Paper.pdf](https://www.bc.edu/content/dam/files/research_sites/cjl/pdf/Justin%20Ilboudo_Research%20Paper.pdf) [https://perma.cc/X2VE-SMGL].

<sup>253</sup> BERNARD BOSANQUET, SOME SUGGESTIONS IN ETHICS 188, 203 (1918) ("There is no estimate which can determine degrees of moral guilt in actual individual cases. Such a thing is wholly inconceivable."); JOHN BRAITHWAITE & PHILIP PETIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 179 (1990) ("The vagueness of desert . . . masks mistakes."); Leo Katz, *Criminal Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 90, 90–91 (Dennis Patterson ed., 1996); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1263 (2005); Russell L. Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 893 (2002); Russ Shafer-Landau, *Retributivism and Desert*, 81 PAC. PHIL. Q. 189, 189 (2000).

<sup>254</sup> See generally Mary Sigler, *Humility, Not Doubt*, 2018 U. ILL. L. REV. 158, 159 (2018) ("Kolber aims to undermine retributivism altogether by miring it in doubt and uncertainty.").

<sup>255</sup> HOSKINS, *supra* note 251, at 84 ("[W]e can at least appeal to the notion of desert to rule out sentences that are clearly too harsh or too lenient."); *id.* at 87 ("Virtually any plausible normative

what some have labeled “limited retributivism,” or “side-constrained retributivism.”<sup>256</sup> In other words, while agreement about the desert basis with exact precision might not be possible, shared intuitions can tell us whether the state furnishing a public criminal record for an entire lifetime is presumptively problematic or not by creating a spectrum with permissible ranges.<sup>257</sup> What happens within the spectrum is then colored by ordinal proportionality principles and can be informed by other purposes.<sup>258</sup>

Ordinal proportionality attempts to calibrate punishments to each other by focusing on parity, rank-ordering, and spacing. Parity suggests that similar offenses should receive similar punishment. Rank-ordering places serious offenses at the top, with longer sentences, and vice versa. Spacing involves the area between different punishments: differences in punishment should reflect differences in seriousness between crimes.<sup>259</sup> Scholars have criticized collateral consequences on ordinal proportionality grounds, pointing out how low-level felons lose the same benefits as serial murderers.<sup>260</sup>

There is a third reason why expungement should catch the eye of the retributivist: the retributivist should be concerned that once an offender has paid the debt connected to the conviction, thereby receiving the required desert, the state should not actively cause that debt to continue to limit the person’s ability to reenter.<sup>261</sup> In other words, retributivist principles

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principle will be supported by at least some intuitions that do not themselves admit of deeper analysis.”).

<sup>256</sup> NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); RICHARD S. FRASE, *JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM* 3 (2013).

<sup>257</sup> See Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, in 16 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 55, 75-79 (Michael Tonry ed., 1992) (discussing how cardinal proportionality creates a framework for determining sentences within the structure); Robinson & Kurzban, *supra* note 24, at 1835 (referencing how modern desert theorists focus on ordinal proportionality).

<sup>258</sup> See Peter Koritansky, *Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas*, 22 *HIST. PHIL. Q.* 319, 335 (2005) (“What criminals deserve, in other words, is determined by estimating the seriousness of the criminal act and is realized by imposing a correspondingly serious penalty within the parameters of a reasonable determination of what will place the criminal back upon equal terms with the rest of the law abiding citizenry.”).

<sup>259</sup> For example, if criminal trespass at night (a) is slightly worse than criminal trespass during the day, but burglary (b) is way worse than both (c), then the distance between (a) and (b) should be small, with (c) far from both.

<sup>260</sup> Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 35 (Marc Mauer & Meda Chesney-Lind eds. 2002) (identifying that “collateral sanctions” are incompatible with proportionality); LaFollette, *supra* note 239, at 244-46 (claiming that collateral consequences conflict with the intuition that “punishment should be proportional to the crime.”); HOSKINS, *supra* note 251, at 90 (noting that collateral consequences violate ordinal proportionality principles of parity and rank-ordering).

<sup>261</sup> See Zachary Hoskins, *Ex-offender Restrictions*, 31 *J. APPLIED PHIL.* 33, 39 (2014) (noting that deserved retribution for past crimes cannot “justify continuing to impose burdens after

contemplate state activity after the direct sentence to ensure extra punishment does not come about. The state has significant rule of law and penal interests in ensuring that extra punishment is not meted out that counteracts already restored order. Nothing less than the restorative nature of the criminal law<sup>262</sup> is at stake, which is crucial to the integrity of the criminal justice system. It also comports with how many individuals perceive the criminal justice system: as a means to justice and restoration.

### B. Desert-Based Expungement Procedure

The above-mentioned principles allow expungement to provide an opportunity for the state to complete the process of punishment, clinching the supposed restorative aspects of desert.<sup>263</sup> By stopping extra punishment via expungement, the state is mindful of how a petitioner's payment of the debt means something real to the individual and to the community that had ordered it.<sup>264</sup> It communicates the end game of the criminal law in particular cases, the point at which societal order has been restored, and the basis for punishment has ended. The state that fails to take these principles seriously actually undermines the meting out of desert in the future because the connection between desert and the crime becomes murkier if punishment endures forever. The sections below identify how these principles might inform expungement procedure.

#### 1. Proportionality, Pre-Hearing Procedure, and Automatic Expungement

Proportionality principles have implications for the types of offenses eligible for expungement as well as the types of procedures that might be required to pursue expungement. These proportionality principles might be reflected in the initial period of time during which the state keeps a record

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[offenders] . . . complete their sentences.”); Murray, *supra* note 17, at 2841 (discussing the rationale for expungement based on the rehabilitation of ex-offenders).

<sup>262</sup> Admittedly, some scholars might not conceive retributivism in this way, preferring the term “reconstructivism.” See Kleinfeld, *supra* note 75, at 1486 (“[R]econstructivism views crimes as communicative attacks on embodied ethical life: crimes threaten social solidarity by undermining the ideas, practices, and institutions at the foundation of social solidarity.”). As mentioned elsewhere, reconstructivism seems like a branch stemming from the original retributivist tree, but one that is particularly mindful of post-Enlightenment political and social first principles. It can be contrasted with what I have labeled “restorative retributivism” in another Article. See Brian M. Murray, *Restorative Retributivism*, 52 UNIV. MIAMI L. REV. (forthcoming 2021) (manuscript at 21) (on file with author) (describing teleologically-based retributivism as having a similar emphasis on the social implications of punishment as reconstructivism).

<sup>263</sup> Murray, *supra* note 17, at 2841 (“[E]xpungement might be labeled the completion of the retributive process because it stops the informal, and perhaps unintentional, effects of formal punishment.”).

<sup>264</sup> Murray, *supra* note 67, at 914 (“By preventing extra punishment, expungement furthers the restorative components of retributivism.”).

public (hereinafter “initial duration”) and the date by which a record becomes eligible for expungement or automatically expunged.

First, both cardinal and ordinal proportionality principles suggest thinking critically about the initial duration during which a criminal record remains public, prior to eligibility for expungement, rather than presuming that criminal records should remain perpetually available. Cardinal proportionality principles urge that the degree of publicity should correlate to the seriousness of the crime, as well as the culpability of the offender. Currently, public criminal recordkeeping systems only discriminate between adult and juvenile offenses with respect to initial publicity, with juvenile records remaining sealed for the most part. But adult murder, theft, and disorderly conduct convictions have the same default duration: forever. Cardinal proportionality would support a distinction in degree, as the desert basis for one crime is different than for another. And that desert basis could inform the timeline for the public aspect of the criminal record. In other words, depending on the seriousness of the crime and the culpability of the offender, the state could create an index of presumed duration of publicity that reflects the desert basis. Serious crimes with high culpability exist at one end of the spectrum, with an initial public duration that is very long, and vice versa. This is feasible, and could reflect relatively nuanced and fixed intuitions of justice found to exist when lay individuals judge the seriousness of crimes and what type of punishment is deserved.<sup>265</sup>

What about ordinal proportionality principles? Parity would suggest that serious felonies should receive the longest initial duration and minor infractions the shortest. Rank-ordering would call for ensuring that lower-level convictions do not remain public longer than more serious convictions. And spacing principles would aim to construct a regime where the initial duration reflects a judgment about the difference in seriousness of the crime. These principles, in turn, would inform the progression to a state-initiated sealing phase, at the moment that proportionality has been reached.

Upon reaching that date, the data that was public could transition to a “sealed” phase, after which it is accessible with some work on the part of the party trying to obtain it. Or, automatic expungement could occur at this point. Recent reforms have reached something like this on non-retributive grounds. But there are two key distinctions here. First, these principles support a state-initiated process given the demands of proportionality. Retributivist proportionality constraints therefore can serve as arguments in favor of automated expungement, or at least an automated beginning to the expungement process. The initiation of the process is contingent on how the

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<sup>265</sup> Robinson & Kurzban, *supra* note 24, at 1845-1865. When it comes to expungement statutes, legislatures already do this to some degree, fixing waiting periods relative to the type of offense.

seriousness of the crime and the culpability of the offender inform the initial period of time during which a criminal record remains public. But once that has been satisfied, the state's obligation to cease the infliction of desert kicks in: expungement becomes the final act that ends punishment, thereby synthesizing the punitive and restorative nature of the state response to crime.

The second key feature that distinguishes retributive-based expungement from current regimes is that automated expungement would not be contingent on proof of rehabilitation or nonrecidivism. The most recent reforms—such as in Pennsylvania and Utah<sup>266</sup>—still link automated expungement to proof of a period of rehabilitation, or at least full compliance with the law post-conviction. But retributivist constraints suggest an alternative route that would be open to expungement without such a showing.

What are the implications of this logic for current expungement procedure? As mentioned above, existing expungement procedure is rife with pre-judgment hurdles relating to paperwork, filing, monetary costs, and preliminary showings.<sup>267</sup> A proper concern for the connection between a public criminal record and the desert basis suggests that many of these hurdles add disproportionate burdens. Retributive-minded expungement would do away with many of these obstacles, instead opting for a more streamlined, state-driven process with few burdens falling on the former offender. By linking expungement to whether desert already happened, rather than whether the ex-offender can prove that rehabilitation has occurred, the state becomes the key player in the process, not the individual. It's the difference between an expungement regime designed to find the worthy and one designed to prevent the state from punishing more than was deserved.

Admittedly, a law like the Pennsylvania Clean Slate Act comes close to these ideas, although a closer look reveals the tentacles of the rehabilitative-based paradigm. That law permits the state to identify and automatically expunge certain types of convictions provided that they meet statutory requirements that can be determined via automated process.<sup>268</sup> This has the great benefit of chopping down the procedural overgrowth described above. But even Pennsylvania's law—considered by many to be the most forward-looking at the moment—only permits automated expungement for non-conviction charges and a limited number of low-level misdemeanor convictions, and only after several years of “crime-free” behavior.<sup>269</sup> That last requirement is the

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<sup>266</sup> See 18 PA. CONS. STAT. §§ 9122, 9122.2 (2020); UTAH CODE ANN. §§ 77-40-103 *et seq.* (LexisNexis 2020)

<sup>267</sup> See *supra* Part III.

<sup>268</sup> 18 PA. CONS. STAT. § 9122.2.

<sup>269</sup> Margaret Love, *Automated Sealing Nears Enactment in Pennsylvania*, COLLATERAL CONSEQUENCES RESOURCE CTR. (June 25, 2018),

rehabilitative paradigm retaining its firm grip on expungement procedure, with expungement primarily tethered to individual merit.

The communicative effect of such a state-sponsored process cannot be underestimated. First, it would communicate finality in the criminal process. That finality would come after warranted desert. The end of the criminal process invokes a new beginning for the individual, and a new relationship between the individual and the state. Punishment has been meted out and social order restored, and thus the individual both should be, and as a practical matter is, free to rejoin society. Second, state-initiated expungement mindful of the obligations of desert would ensure that hope for offenders remains despite prior behavior, and a hope that springs forth from the community itself. The state that is not callously indifferent to the fate of its offenders is a state that communicates that it takes each member of the community seriously, no matter what.<sup>270</sup> This is a principle that also underlies enforcement of the criminal law and its social components.

## 2. Burdens of Proof

While the analysis above suggests retributivist principles can justify automated expungement, there may be some circumstances that warrant a hearing in front of a decision-maker. For example, it might be the case that certain crimes have such a high desert basis that the state decides to create procedures that preserve hearings as an opportunity for various stakeholders to play a part in the decision.<sup>271</sup> That seems completely reasonable in a liberal democratic regime, especially one where penal purposes beyond retribution are part of the criminal justice process. As such, state-initiated expungement could still result in a hearing at which a final determination is made. But what should that hearing entail and what should be the standard of review?

As mentioned above, many existing expungement regimes place the burden of persuasion on the petitioner at the hearing, either overtly, or in practice given the procedural hurdles to relief. This seems to be exactly backwards according to retributivist constraints, which would presume that the state must continue to justify the retention of a public record for either additional punitive reasons or some other reason. Assuming that a petitioner is eligible for expungement due to the satisfaction of desert already assigned, the state can assert one of two arguments: (1) the initial desert calculation,

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<https://ccresourcecenter.org/2018/06/25/automatic-sealing-nears-enactment-in-pennsylvania/>  
[<https://perma.cc/QP2B-PDGG>].

<sup>270</sup> Murray, *supra* note 262, at 18 (discussing “retributivist callousness” and its effects on society).

<sup>271</sup> Expungement statutes tend to restrict eligibility to certain offenses. Offenses that are typically ineligible for expungement include those related to homicide, sexual assault, and violent offenses.

linked to the public criminal record, was incorrect; or (2) there is some other reason to preserve the record, unrelated to the initial punishment doled out.

What would this look like in practice? States would need to acknowledge, preferably by statute, that at a hearing the state must make a showing on one of these two grounds. The statute should clearly ascribe the burden to the state rather than simply provide factors for consideration. Presumptions in favor of expungement can be justified based on the above principles, likely in the form of a sliding scale that takes into account offense seriousness and blameworthiness. The petitioner should not be required to make a showing, although permitted to do so in response to any showing that the state makes.

With respect to the first possible argument put forth by the state, the burden should be high given legislative judgments already made regarding the initial duration of the public criminal record before it is eligible for expungement. If the legislature has already deemed an offense expungement-eligible after a set period of time, then a prosecutor must be tasked with providing a clear and convincing justification to a judge as to why a particular case should be distinguished.

What about the standard of review for the second possible argument? Some existing expungement regimes allow preservation of a record if the state, by a preponderance of the evidence, indicates some need for the information. This bar seems too low given the diffuse and significant consequences of a public criminal record. Expungement regimes should hold the state to a heavy burden, requiring a clear nexus between the stated need for the information and the purported interest put forth by the state. And that evaluation should remain tethered to the fundamental question underlying expungement: whether the information needs to be public to mete out desert, not whether it is useful. There is room for the state to meet a heavy burden that simultaneously allows for preservation of the information for limited purposes while effectively eliminating much of the unintended fallout from a record being public.

### 3. Retributivist Prosecutors and Expungement

The significant role of the prosecutor in existing expungement regimes is undeniable. Prosecutors can delay, oppose, veto, and initiate expungements. That is a remarkable amount of power that persists in the wake of the prosecutorial ability to make decisions that affect charging, plea deals, and sentencing results. Further, there are a significant number of prosecutors with retributivist inclinations themselves, or who wish to serve as the voice of the desert-based intuitions of their constituencies. How should these prosecutors interact with expungement procedure given the aforementioned discussion?

A key realization here is that prosecutors act as the sovereign's representative with immense power.<sup>272</sup> Being the sovereign's representative in the criminal context means that the voice of the prosecutor represents, to many, if not all, the voice of the state. Thus, a prosecutor's stance towards expungement has the capacity to communicate the state's policy towards punishment. And it bears remembering that the legislature has already afforded expungement as a remedy, meaning a prosecutor should have good reason if she desires to supplant the position of the legislature with a different position on behalf of the state.<sup>273</sup>

It also means that the prosecutor is in the unique position of trying to democratically represent notions of desert. This puts prosecutors in quite a difficult position, tasking them with contemplating and acting upon the desert-based notions of their constituencies, provided that they are acceptable within the broader legal framework.

Given that expungement has the capacity to mitigate possibly undeserved punishment, retributivist prosecutors should be mindful of the proper limits of state exaction of punishment. In the arrest without conviction context, this means that retributivist prosecutors should consider a strong presumption in favor of expungement, absent exceptional circumstances where deserved punishment would have occurred but for some occurrence that fortunately favored the defendant.<sup>274</sup> For convictions, prosecutors should contemplate a presumption in favor of expungement once the individual has completed the prescribed sentence. Prosecutors could work with the legislature to determine

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272 The Mississippi Supreme Court recognized this power:

A fearless and earnest prosecuting attorney . . . is a bulwark to the peace, safety and happiness of the people . . . [I]t is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled . . .

*Hosford v. State*, 525 So. 2d 789, 792 (Miss. 1988); *see also* *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting how prosecutors are "the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000) ("A prosecutor is a servant of the law and a representative of the people . . . We are unable to locate an excuse for a prosecutor's failure to understand the remarkable responsibility he or she undertakes when rising in a courtroom to announce an appearance for the State of Kansas.").

273 *See* *Murray*, *supra* note 17, at 2865 ("Finally, the statute driving the proceeding is not a prohibition; rather, it is a cause of action providing relief. The very existence of an expungement regime suggests a conception of justice that leaves room for mercy.").

274 In other words, where desert is unobjectionable and failing to oppose expungement would result in an unjustified windfall for the defendant.



whether waiting periods are properly calibrated to what was deserved at the time of formal punishment.

In terms of procedure, prosecutors could make a decision to rarely oppose expungement in cases where the convicted individual has completed the assigned sentence. As the agent of the state with respect to the criminal law, prosecutors overreach when they stall expungement to exact punishment beyond what was prescribed as part of the sentence. This approach stems from concerns about proportionality in punishment and the obligations of the state to not inflict suffering beyond the demands of the criminal law. Further, prosecutors should be reluctant to impose onerous procedural hurdles on petitioners. Finally, prosecutors should strive to treat similar cases similarly. Institutionally, having clear office policies that set the parameters of retributivist constraints is a step in the right direction, rather than having ad hoc discretionary decisions by front line prosecutors.<sup>275</sup>

A possible counterargument is that prosecutors might consider the stigma attached to a public criminal record as a legitimate component of the desert stemming from a violation of the criminal law. If that is the case, then the prosecutor must reflect on whether support for the direct sentence requires reconsideration, or perhaps whether different charges were in order. That reflection can trickle to future cases. Regardless, the retributivist prosecutor should be thinking about how the public nature of the criminal record amplifies the punishment inflicted upon the offender, whether at the phase of charging, bargaining, or expunging. Failing to do so abrogates the prosecutor's role to consider the demands of justice in individual circumstances.<sup>276</sup>

Some prosecutorial offices have begun to serve as partners in the expungement process for certain low-level convictions. For example, the Manhattan District Attorney's Office now provides information to would-be petitioners and has supported efforts by legal aid organizations to bring expungement relief to broad swaths of the population.<sup>277</sup> This type of state-initiated procedure can be supported by the principles outlined above. As Terry Curry, elected prosecutor in Marion County said, "[i]f an individual has stayed out of the criminal justice system, then why should they continue to have that stain forever?"<sup>278</sup> This thinking has led prosecutors in Indiana, Louisiana, Vermont, and North Carolina to hold expungement clinics.<sup>279</sup>

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<sup>275</sup> See Murray, *supra* note 17, at 2868 ("Another measure that could help to ensure consistency is the development of a clear office policy on expungement.").

<sup>276</sup> MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 1983).

<sup>277</sup> See *supra* note 191.

<sup>278</sup> Alan Blinder, *Convicts Seeking to Clear Their Records Find More Prosecutors Willing to Help*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/us/expungement-criminal-justice.html> [<https://perma.cc/68BB-X9SN>].

<sup>279</sup> *Id.*

Then-Governor Mike Pence said, “Indiana should be the worst place in America to commit a serious crime and the best place, once you’ve done your time, to get a second chance.”<sup>280</sup>

Prosecutors can review petitions, set up frameworks to identify eligible cases and individuals, and notify those individuals themselves or hold clinics to do so. These individualized practices provide support for the aspirations appearing in some recent reforms that task state agencies with identifying eligible individuals. Additionally, they can provide legitimacy to the project of the criminal law by making prosecutors partners in the restitching of the social fabric post-punishment.<sup>281</sup> Put simply, retributivist prosecutors should be vigilant about the lines of desert and how expungement limits the state’s ability to over-punish.

### C. *Summarizing Desert-Based Expungement*

The above sections suggest some parameters for the retributive-based expungement paradigm. Practically speaking, there are five criteria that legislatures should have in mind when thinking about how to apply these principles:

- (1) Tying the time during which a record is public to the desert basis of the crime, properly distinguishing between crimes;
- (2) Ensuring waiting periods for expungement are no longer than the desert basis;
- (3) Establishing a presumption for expungement, or automating it upon the completion of a sentence or the already determined waiting period;
- (4) Ensuring the state initiates the expungement process to prevent over-punishment, thereby avoiding onerous procedural hurdles currently faced by petitioners and reducing costs;
- (5) Limiting prosecutorial discretion to oppose expungement to rare circumstances, and only when there is a clear need for a record to remain public to further a significant interest connected to what was originally deserved.

These constraints would help establish appropriate ranges for the duration of public criminal records, and clearly delineate waiting periods,

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<sup>280</sup> *Id.*

<sup>281</sup> *See id.* (quoting an Indiana deputy prosecutor Andrew Fogle: “If the prosecutor is O.K. with this, maybe there is something to it.”).

calibrated to proportionality principles. In turn, these judgments would be the primary determinant of eligibility for expungement and permit automated expungement for some classes of offenses. Second, retributive expungement would clearly place the burden of persuasion and proof on the state to retain the data. This would entail a high burden of proof and few requirements on the former offender. Finally, retributive expungement places the onus on the state to initiate and complete the expungement process given the state's overarching interest in ensuring the limits of the reach of the criminal law and that punishment is no more than what is deserved.

### CONCLUSION

Despite broad substantive expungement reform in recent years, a gap persists between the remedy, available in theory, and its achievement in practice. A close examination of expungement procedure—from the origin of the remedy to the present day—reveals the theoretical underpinnings of the expungement processes that are preventing expungement: those procedures are the logical outgrowth of a remedy built on rehabilitative ideals, which focuses on individuals having to prove their worth. While the past decade has seen an unprecedented increase in expungement reform, the roots of expungement only allow so much growth.

The rehabilitative origin of expungement forces petitioners to navigate a difficult procedural process and places too many burdens on petitioners. This is the case even when individuals aim to expunge an arrest or a conviction after serving the complete sentence. Early expungement statutes required petitioners to prove that they were rehabilitated, either formally at a hearing or informally through their ability to navigate the difficult landscape of expungement procedure. Petitioners had to prove their worthiness and that they were not risky bets. These obstacles to expungement were initially conceived of as features, allowing the state to delicately balance public safety with the petitioner's interests. That framework persists to this day: while recent reforms in numerous states have broadened eligibility for expungement, the procedure underlying the remedy remains wedded to rehabilitative premises, thereby continuing to place the burden on petitioners to prove that they no longer deserve the stigma-based punishment of a public criminal record. This interpretive critique of expungement procedure helps explain the "uptake gap."

What can be done? Connecting expungement procedure to retributivist premises would place the burden on the state to justify the continued existence of public criminal records. Given the punitive effect of public criminal records and their connection to collateral consequences, the state should be concerned about imposing extra punishment, beyond what

petitioners deserve. Expungement should thus focus less on the individual and more on the state. A retributivist expungement paradigm can trim the procedural overgrowth that undercuts the promise of expungement reform and provide solid theoretical footing for automatic, state-initiated expungement. Retributivist constraints can inform how long records should remain public and allow for robust procedural protections for ex-offenders and petitioners for relief, shifting the burden of persuasion to the state. At the very least, retributivist principles will further conversation as to the limits of state authority when it comes to punishment, helping to advance the reentry that individuals deserve.